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34

**REPORTS**

**OF**

**CIVIL AND CRIMINAL CASES**

**DECIDED BY THE**

**COURT OF APPEALS**

**OF KENTUCKY**

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**ROBERT G. HIGDON, Reporter**

**VOLUME 162 KENTUCKY REPORTS**

**CONTAINING CASES DECIDED FROM**

**DECEMBER 18, 1914, TO FEBRUARY 18, 1915.**



The State Journal Company  
Printers to the Commonwealth  
Frankfort, Ky.  
1915

MAY 19 1915

# **JUDICIAL OFFICERS OF THE STATE**

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## **COURT OF APPEALS OF KENTUCKY**

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(As constituted during the period covered by this volume from December 18, 1914, to February 18, 1915.)

**HON. SHACKELFORD MILLER, Chief Justice.**

### **ASSOCIATE JUSTICES.**

**HON. W. E. SETTLE**

**HON. JOHN D. CARROLL**

**HON. C. C. TURNER**

**HON. J. B. HANNAH**

**HON. CLEMENT S. NUNN**

**HON. ROLLIN HURT**

**HON. WM. ROGERS CLAY, Commissioner.**

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**ROBERT G. HIGDON, Reporter Court of Appeals.**

**ROBERT L. GREENE, Clerk Court of Appeals.**

## JUDGES OF CIRCUIT COURTS

Elected November 2, 1909, for a term of six years, beginning the first  
Monday in January, 1910.

---

1st District—R. B. FLATT.....	Clinton
2nd District—W. M. REED.....	Paducah
3rd District—J. T. HANBERRY.....	Hopkinsville
4th District—J. F. GORDON.....	Madisonville
5th District—J. W. HENSON.....	Henderson
6th District—T. F. BIRKHEAD.....	Owensboro
7th District—JOHN S. RHEA.....	Russellville
8th District—McKENZIE MOSS.....	Bowling Green
9th District—J. R. LAYMAN.....	Elizabethtown
10th District—SAMUEL E. JONES.....	Glasgow
11th District—I. H. THURMAN.....	Springfield
12th District—CHAS. C. MARSHALL.....	Shelbyville
13th District—CHAS. A. HARDIN.....	Harrodsburg
14th District—R. L. STOUT.....	Versailles
15th District—J. W. CAMMACK.....	Owenton
16th District—F. M. TRACY.....	Covington
16th District—M. L. HARBESON.....	Covington
17th District—CHAS. W. YUNGBLUTH.....	Newport
18th District—L. P. FRYER.....	Butler
19th District—C. D. NEWELL.....	Maysville
20th District—WM. C. HALBERT.....	Vanceburg
21st District—W. A. YOUNG.....	Morehead
22nd District—CHAS. KERR.....	Lexington
23rd District—HUGH RIDDELL.....	Irvine
24th District—A. J. KIRK.....	Paintsville
25th District—J. M. BENTON.....	Winchester
26th District—W. T. DAVIS.....	Pineville
27th District—WM. LEWIS.....	London
28th District—B. J. BETHURUM.....	Somerset
29th District—J. C. CARTER.....	Tompkinsville
30th District—JAMES P. GREGORY, Criminal Branch, Jefferson Circuit Court.....	Louisville
30th District—JAMES QUARLES, Chancery Branch, First Division, Jefferson Circuit Court.....	Louisville
30th District—SAMUEL B. KIRBY, Chancery Branch, Second Division, Jefferson Circuit Court.....	Louisville
30th District—WM. H. FIELD, Common Pleas, First Division, Jefferson Circuit Court.....	Louisville
30th District—THOMAS R. GORDON, Common Pleas, Second Division, Jefferson Circuit Court.....	Louisville
30th District—WALTER P. LINCOLN, Common Pleas, Third Division, Jefferson Circuit Court.....	Louisville
30th District—CHAS. T. RAY, Common Pleas, Fourth Division, Jefferson Circuit Court.....	Louisville
31st District—D. W. GARDNER.....	Salersville
32nd District—M. M. REDWINE.....	Sandy Hook
33rd District—L. D. LEWIS.....	Hyden
34th District—FLEM D. SAMPSON.....	Barboursville
35th District—J. M. ROBERSON.....	Pikeville

## COMMONWEALTH ATTORNEYS

Elected November 2, 1909, for a term of six years, beginning the first Monday in January, 1910.

---

1st District—H. J. MOORMAN.....	Mayfield
2nd District—JNO. G. LOVETT.....	Benton
3rd District—DENNY P. SMITH.....	Cadiz
4th District—JNO. L. GRAYOT.....	Smithland
5th District—S. V. DIXON.....	Henderson
6th District—BEN D. RINGO.....	Owensboro
7th District—J. R. MALLORY.....	Elkton
8th District—JOHN H. GILLIAN.....	Scottsville
9th District—H. D'H. MOORMAN.....	Hardinsburg
10th District—F. E. DAUGHERTY.....	Bardstown
11th District—C. S. HILL.....	Lebanon
12th District—CHAS. H. SANFORD.....	New Castle
13th District—EMMETT PURYEAR.....	Danville
14th District—VICTOR A. BRADLEY.....	Georgetown
15th District—JNO. J. HOWE.....	Carrollton
16th District—R. G. WILLIAMS.....	Covington
17th District—WM. A. BURKAMP.....	Newport
18th District—JAS. C. DEDMAN.....	Cynthiana
19th District—M. J. HENNESSEY.....	Augusta
20th District—J. B. WILHOIT.....	Ashland
21st District—W. B. WHITE.....	Mt. Sterling
22nd District—JNO. R. ALLEN.....	Lexington
23rd District—THOS. C. JOHNSON.....	Tallega
24th District—ISAAC G. RICE.....	Paintsville
25th District—B. A. CRUTCHER.....	Winchester
26th District—J. G. FORESTER.....	Harlan
27th District—J. C. CLOYD.....	Manchester
28th District—M. L. JARVIS.....	Somerset
29th District—A. A. HUDDLESON.....	Burksville
30th District—JOS. M. HUFFAKER.....	Louisville
31st District—WM. H. MAY.....	Prestonsburg
32nd District—J. W. WAUGH.....	Grayson
33rd District—IRA FIELDS.....	Hazard
34th District—JOS. B. SNYDER.....	Williamsburg
35th District—R. MONROE FIELDS.....	Whitesburg



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**DECISIONS**  
**OF THE**  
**Court of Appeals of Kentucky**

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**FALL TERM, 1914**

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**Standard Oil Company v. Marlow, By et al.**

(Decided December 18, 1914.)

**Appeal from Pulaski Circuit Court.**

1. **Damages—Action—Evidence—Instruction.**—Where in an action for damages against a corporation and its agent evidence was admitted which was competent against the agent but not against the corporation, an only instruction authorizing a recovery is prejudicial, where it requires the jury to find against both the corporation and the agent if they believe that the agent was negligent.
2. **Appeal—Former Opinion—Law of the Case—Instruction.**—Where on a former appeal only certain instructions are considered and modified, and the court does not direct that they alone shall be given on another trial, an instruction not criticized is tacitly approved, and becomes the law of the case, and should be given on the second trial, either in that form or in a form that will not materially change the effect thereof.
3. **Appeal—Former Opinion—Law of the Case—Instruction.**—Where on a former appeal the Court of Appeals indicated errors in certain instructions complained of, the lower court was not precluded from giving on a return of the case a proper instruction on another subject which had been covered by the instruction given on another trial, and not criticized in the opinion.
4. **Master and Servant—Injury to Servant—Action for Damages—Evidence of Employment.**—In an action for damages for personal injuries by an alleged servant against the master, evidence that the master's manager attempted to employ another boy is not competent to show that the manager employed plaintiff or knew he was engaged in doing certain work.

**O. H. WADDLE & SONS** for appellant.

**ROBT. HARDING, D. E. McQUEARY and EMMET PURYEAR** for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Joe E. Marlow, an infant, suing by his next friend, brought this action against the Standard Oil Company and its manager, William Uhl, to recover damages for personal injuries. On the first trial of the case he recovered a verdict and judgment against the Standard Oil Company for \$3,500, and against William Uhl for \$500.00. On appeal to this court the judgment was reversed for errors in the instructions. *Standard Oil Co., &c. v. Marlow*, 150 Ky., 647. On the return of the case another trial was had which resulted in a verdict and judgment against the Standard Oil Company for \$5,000, and against its co-defendant, William Uhl, for \$1,000. The Standard Oil Company appeals.

On the second trial several witnesses testified to certain admissions of Uhl made a day or two after the accident which tended to show negligence on his part. As these admissions were not a part of the *res gestae* the trial court admonished the jury that they could not be considered in determining the liability of the Standard Oil Company. Counsel for the Standard Oil Company offered instructions as follows:

"A. In determining the question as to whether defendant Uhl told Cox and Marlow when they quit painting barrels to wash their hands and clothes in gasoline and burn the gasoline, if dirty, in the street, as referred to in instruction No. 1, you will not consider any evidence introduced by plaintiff tending to show that in conversations by Uhl with other parties during the night after the accident said Uhl either admitted or said he had so told said Cox and Marlow, and unless you believe from the evidence independent of such alleged admission or conversation that Uhl did so tell or instruct Cox and Marlow, you will find for defendant, Standard Oil Company.

"B. If you shall find for plaintiff at all you may find against or in favor of either of the defendants, and if you shall find against both of the defendants you may say in your verdict how much of your finding shall be paid by each of the defendants."

It is insisted that the court erred in refusing to give one or the other of the offered instructions or an instruction similar in effect. In support of this proposition counsel relies on the case of *C., N. O. & T. P. Ry.*



Co. v. Cook's Admr., 113 Ky., 161, where an action for damages was brought against the railroad and its engineer. It appears that some time after the accident the engineer made certain admissions which the court held were competent against him, but were not competent against the company, as they were not part of the *res gestae*. At the time the evidence was received the court admonished the jury that the evidence was not competent against the company, but was competent only against the engineer. The only instruction given by the court required the jury, if they believed that the engineer was negligent, to find against both him and the company. The court held that the admonition of the court that the evidence complained of was not competent against the company was rendered of no effect by the instruction given, which required a finding against both defendants if they believed the engineer was guilty of negligence. The court said:

"The effect of the instruction was, therefore, to deny the company all benefit from the exclusion of this evidence as to it, and place it in the same position it would have occupied if that ruling had not been made."

On the first trial of the case the court gave to the jury six instructions which were offered by the plaintiff, and one instruction which was offered by the defendant. Instruction No. 1 authorized a finding against defendant, Standard Oil Company, if they believed that Uhl or Cox, a painter, employed by Uhl, was negligent. Instruction No. 2 authorized a finding against both defendants if they believed that Uhl was negligent. Instruction No. 3 prescribed the measure of damages. Instruction No. 4 defined gross negligence. Instruction No. 5 defined ordinary care. Instruction No. 6 covered the question of contributory negligence. Instruction D, which was the 7th instruction, was as follows:

"If you shall find for plaintiff at all you may find against or in favor of either of the defendants, and if you shall find against both of the defendants you may say in your verdict how much of your finding shall be paid by each of the defendants."

In the opinion on the first appeal the court did not set forth all the instructions given, but set forth instructions 1, 2 and 3. Instruction No. 1 was held erroneous because neither Uhl nor the company was responsible for the action of Cox, who was not their agent. Instruction No. 2 was modified in certain respects and directed to be

given on another trial. It was further held that no instruction on gross negligence should be given. The court also said that a certain instruction offered by defendant should have been given. The court did not criticise instruction D, or direct that it should not be given. The court did not say that on another trial the trial court should have instructed the jury as follows, and then set out the instructions to be given. It did not in terms or by implication say that the instructions considered by the court were all the instructions that should be given on the next trial. It is well settled that where the instructions given on a trial are before this court and not criticised, they are tacitly approved, and become the law of the case. *Louisville & A. R. Co. v. Cox's Admr.*, 125 S. W., 1056. As instruction D, authorizing a finding against either of the defendants or both, was not criticized on the former appeal, but was tacitly approved, it became a part of the law of the case, and should have been given either in that form or in a form that would not have materially changed the effect thereof. If it were not the rule that an instruction not criticised, but tacitly approved on a former appeal should be given, then the trial court in this instance would not have been justified in giving instructions defining ordinary care and contributory negligence, given on the first trial. As the court on the first appeal considered only certain instructions, and did not say that they were all the instructions to be given on the next trial, the trial court was not precluded by the former opinion from giving instruction A offered by the defendant, or one similar in effect. Instruction D was asked on the first trial by the defendants, and was given on their motion. They appealed. There was no complaint on that appeal of the instructions which had been given on their motion, and the attention of the court was not directed to them. When this court indicated errors in certain instructions which were there complained of, the lower court was not precluded from giving on the return of the case a proper instruction on another subject which had been covered by an instruction given on the other trial and not criticised in the opinion. That the action was prejudicial there can be no doubt, for the admonition of the court that Uhl's admissions were not competent against the Standard Oil Company was rendered of no effect by the instruction of the court which required a finding against both defendants if the jury believed that Uhl

was negligent. A reversal of the case, therefore, cannot be avoided unless the well established rule laid down in *C., N. O. & T. P. Ry. Co. v. Cook's Admr.*, *supra*, be disregarded.

The trial court should not have permitted plaintiff to prove that Uhl, a short time before the accident to plaintiff, attempted to hire a boy by the name of Hughes to assist Cox in painting the barrels. This evidence introduced an issue entirely foreign to the case. The effort to employ Hughes has no bearing on the employment of Marlow or defendant's knowledge that he was engaged in assisting Cox. The fact that an effort was made to employ one boy does not tend to show that Uhl employed plaintiff or knew that he was engaged in assisting Cox.

In view of the foregoing, we deem it unnecessary to determine whether or not the verdict is excessive.

In view of the fact that instruction A offered by the defendant on the last trial more clearly presents defendant's case with respect to the admissions of Uhl, the court will give that instruction instead of instruction B. It will also give the same instructions given on the second trial.

Judgment reversed and cause remanded for new trial consistent with this opinion.

Whole court sitting, Judge Nunn dissenting.

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### Morgan, et al. v. Figg, et al.

(Decided December 18, 1914.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).

1. **Municipal Corporations—Cities of Sixth Class—Street Improvements—Assessment of Costs—Authority of Board of Trustees—Section 3706, Kentucky Statutes.**—Since Section 3706, Kentucky Statutes, authorizing the original improvements of streets in cities of the sixth class at the cost of the abutting property owner, does not provide that payment therefor, when the ten year bond plan is not adopted, shall be made in cash, it is within the power of the board of trustees to contract for the work either on a cash basis or a deferred payment plan, and it is no defense to an action by a contractor to enforce a lien for such improvements that a bid was accepted on a deferred payment plan.
2. **Municipal Corporations—Cities of Sixth Class—Improvement of Streets—Lien on Abutting Property—Section 3706, Kentucky**

**Statutes.**—Under Section 3706, Kentucky Statutes, street improvement assessments are secured by a lien on the abutting property, whether made on the ten year bond plan or otherwise.

**JOSEPH S. LAWTON and W. S. SANFORD** for appellants.

**FURLONG, WOODBURY & FURLONG** for appellees.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,**  
**COMMISSIONER—Affirming.**

Plaintiffs, L. R. Figg, suing for the First National Bank, and the First National Bank, brought this action against defendants, John S. Morgan and others, abutting property owners, to enforce certain liens for the improvement of Third Street in the town of Oakdale, between Young Street and the Boulevard. The chancellor granted the relief prayed for, and the defendants appeal.

Oakdale is a town of the 6th class. Section 3706, Kentucky Statutes, providing for the improvement of streets in towns of the sixth class, is in part as follows:

“The board of trustees is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways, and public places of such towns. The cost and expenses incurred in repairing streets, avenues, highways, sewers, and public places shall be paid out of the general fund of the town. The expense incurred in making and repairing sidewalks and curbing shall be paid by the owners of the land fronting and abutting thereon, if the board of trustees so order, each lot or portion of lot being separately assessed for the full value thereof in proportion to the frontage thereof to the entire length of the whole improvement, not to exceed a square, sufficient to cover the total expense of the work.

“The cost and expenses incurred in constructing or reconstructing sidewalks, curbing, streets, avenues, highways, sewers, and public places shall be paid out of the general fund of the town or by the owners of the lands fronting and abutting thereon, as the board of trustees may, in each case determine; but the local assessment shall not exceed fifty per centum of the value of the ground after such improvement is made excluding the value of the buildings and other improvements upon the property so improved.

"Whenever the board of trustees shall determine upon the construction or reconstruction of streets, avenues, highways, sewers, and public places at the expense of the abutting property, they shall cause the same to be done as follows:

"The ordering of such improvement shall be by ordinance of the board of trustees, and the contract therefor shall be awarded to the lowest and best bidder after proper advertisement for bids.

"The said board of trustees shall require the accepted bidder to execute a bond to the town with good and sufficient surety to be approved by said board of trustees for the faithful performance of his contract.

"The original construction or reconstruction of any sidewalk, curbing, streets, sewers, avenues, highways, alleys, and public places may be made the exclusive cost of the owners of the lots and parts of lots or land fronting or abutting or bordering upon the proposed improvement be equally apportioned by the board of trustees according to the number of front feet owned by them respectively upon the petition of the property owners of lots or parts of lots, or land abutting or bordering upon the proposed improvement; or the board of trustees may cause same to be done without such petition upon the vote of four members-elect of said board of trustees at a regular meeting thereof; or the board of trustees may, by a majority vote at any regular meeting thereof, cause any such improvement to be made upon the ten-year bond plan."

The remainder of the foregoing section applies to improvements made on the ten-year bond plan, and is not material to this case.

The improvement in question was ordered during the year 1905, by votes of four trustees. Bids were called for by proper advertisement. There were three bidders. Plaintiff Figg agreed to do the work for \$4.50 a lineal foot on each side of the street, payment thereof to be made in installments extending over a period of not exceeding five years from the completion of the work, and also agreed to do the work at \$4.29½ a lineal foot on each side of the street if the town itself would pay cash. Figg's bid was the lowest and was accepted by the board of trustees. The contract was drawn up and signed by the board of trustees and by Figg and his surety, providing that payments should be made either in cash or in equal quarter-annual payments, to

extend over a period not exceeding five years. Pursuant to the above contract the improvement was completed. Figg testified that where he was required to look to the property owners for payment his bid would be the same, whether on a cash basis or deferred payment plan. There is no evidence to the effect that his bid was higher because of the method of payment. The property owners admit that if they had to pay at all they would prefer to pay on the deferred payment plan.

The regularity of the proceedings is called in question in only one respect. It is insisted that the statute provides for two plans, one on a cash basis, and one on the ten-year bond plan; that instead of adopting one or the other of these two plans, the board of trustees accepted the bid on the five-year payment plan, which, not being authorized by the statute in question, invalidates the whole assessment.

It will be observed that Section 3706, *supra*, authorizes the board of trustees to order the construction of a street at the cost of the lot owners abutting thereon, to be equally apportioned by the board of trustees according to the number of front feet owned by them respectively, either upon the petition of a majority of the abutting property owners, or without such petition upon a vote of four members-elect of the board of trustees, at a regular meeting thereof. The act in question is not as specific as the acts relating to street improvements in towns of other classes. The act provides for assessing the cost against the abutting property. It also provides for the issuing of bonds on the ten-year plan. When the latter plan is adopted improvement taxes are divided into ten annual installments, and bear interest from date. In view of the latter provision, it is insisted that when the first plan is followed, payment of the assessments must necessarily be in cash. This, however, is a mere inference. The statute is silent upon the subject. It contains no provision requiring payment to be made in cash. In the absence of such provision, we conclude that it is within the power of the trustees to contract for the improvement either on a cash basis or on a deferred payment plan, or to give to the property owner, as was done in this case, the option to pay either in cash or on a deferred payment plan. Certainly there can be no complaint of the deferred payment plan where, as in this case, it does not appear that the contractor's bid was any higher because of that plan, and the property owners

say that if they have to pay at all they prefer to pay on that plan. Under this view of the statute it cannot be said that the trustees provided for a time of payment not authorized by the statute.

While it is true that the act does not in terms provide where the ten-year plan is not adopted that the cost of the improvements shall be a lien on the abutting property, it is apparent from the act that such was the purpose of the Legislature. It did not have the power to impose a personal liability on the abutting property owner. When, therefore, the act provided that the work should be done at the cost of the abutting property owner, and should be apportioned by the board of trustees according to the number of front feet owned by them respectively, there can be no escape from the conclusion that the assessment should be secured by a lien on the abutting property.

Judgment affirmed.

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### **Sellers v. Sellers, etc.**

(Decided December 18, 1914.)

#### **Appeal from Harrison Circuit Court.**

1. **Deeds.**—The courts make a distinction between testamentary deeds and a deed which is the result of an ordinary business transaction, and where the parties are dealing with each other as business antagonists.
2. **Verdict**—When Court May Disregard.—Where in an equitable action the court submits the issues to a jury merely for their advisory aid, their verdict is not necessarily conclusive, and the court may disregard it.

**W. S. CASON and CASON & COX** for appellants.

**M. C. SWINFORD** for appellee.

#### **OPINION OF THE COURT BY JUDGE NUNN—Reversing.**

This is a controversy between a widow and her step-children. Eleven Sellers owned a farm and a small home in a little town. During his last illness he conveyed the home to his wife in fee. This is a suit in equity by the children to set aside that deed on the grounds of undue influence and mental incapacity. The farm is not involved. The court submitted the issues of fact to a

jury, and nine of them signed a verdict against the deed. The court rendered a judgment thereon, holding the deed invalid. The widow appeals.

Eleven Sellers was married to the appellant in 1899. He was 64 years old, and she was 49. It was his second marriage and her first. He had three children by his first wife, and they are the appellees. There was no issue of the second marriage. At the time of the second marriage his three children had married and were raising families of their own. Mr. Sellers lived thirteen years after this marriage, and died at the age of 77. At the time of the marriage he owned a farm of 117 acres, four or five miles from the town of Berry, in Harrison county. About a year after the marriage he became afflicted with weeping eczema, a foul and loathsome disease. The physician says it covered his whole body and was the worst case he ever saw. For years he suffered from this, and required the services of a physician. Mrs. Sellers had to bathe him and wash and change his clothing and bed linen every day. Besides this she cooked and did all the washing and housekeeping. During a part of the first year she had for help a little ten-year-old girl, but from that time until her husband's death she did all the work.

After living on the farm seven years they moved to Berry; that is, in 1906. Mr. Sellers bought a little house there for \$600, and they lived in it until his death. The proof shows that he went back and forth to his farm every day or so, as the weather would permit, but along in January before his death in March, 1912, he sold about 10 acres off of his farm. No one doubts that at this time he was mentally capable of protecting himself in a business transaction. His children were displeased when they heard that he had sold part of the farm, and, as they say, they heard he was about to sell the remainder. So, by agreement among themselves, they met at Berry in the latter part of January, 1912, and went in a body to the home of their father and "Mrs. Sellers," as they speak of her. They told him, in Mrs. Sellers' presence, that they did not want the farm sold and asked him to transfer or turn it over to them for division, and they would give him a contract to pay him \$15 per month for his support. He was surprised and his feelings hurt, and in tears told them that it was his property and he felt capable of managing his own affairs. After this he talked with several of his neighbors, told



them the facts of his children's visit and his disappointment, and fear that they would try to deprive his widow of a home when he died. He told them he wanted to secure to Mrs. Sellers the home in Berry, and inquired of them about the efficacy of wills and deeds, and said he was afraid of wills, because they were sometimes broken. On March 29th, he was taken down with acute bladder trouble. Dr. Lang, who for years had been treating him for eczema, was called in. This doctor was also a notary public. On April 6th, Mr. Sellers had the doctor prepare a deed, and by which he conveyed to his wife the little town home. The doctor says that up to and including this time Mr. Sellers possessed all his mental faculties, and understood what he was doing and the effect of the deed.

Dr. Lang testifies that Mr. Sellers told him what he wanted done and why he wanted to do it. In fact, Mr. Sellers had advised with him two months before and said that as soon as he could get time he wanted the doctor to fix up some papers for him, and, in that connection, told him of the visit of his children, and their desire to have him divide his farm between them. He gave to the doctor the same reason for having the deed written that he had expressed to his neighbors—the fear that his children would not deal fairly with his widow. He also made mention of the burden he had been, and of Mrs. Sellers' faithfulness in caring for him during all of his afflictions, and that it would be doing too little for her to give her the town home.

As soon as Mr. Sellers was taken sick his children began to visit him, and, as they say, aided in caring for him and administered medicine. They testify to giving him tablets prior to April 6th, which acted like opiates, and say that at no time after he was taken sick and these medicines were administered to him was he mentally capable of understanding a business transaction. The trial proceeded on the idea that the deed was of a testamentary character, and the same wide range was permitted in the introduction of testimony, but the instructions to the jury were based rather upon the idea that the instrument in question was an ordinary deed, executed under circumstances when the parties are supposed to be dealing at arms' length, and required the jury to believe that Mr. Sellers not merely knew the objects of his bounty and the nature of his property, but also *his property rights*. Naturally the jury must have

concluded that it requires a higher degree of mental soundness to know one's property rights than it does to know what property one has. Under these instructions the jury found against Mrs. Sellers and set the deed aside.

The courts make a distinction between testamentary deeds and a deed which is the result of an ordinary business transaction, and where the parties are dealing with each other as business antagonists. *Meuth's Exrx v. Meuth*, 157 Ky., 784; *Best, & Co. v. House*, 113 S. W. Rep., 849; *Brammel v. Brammel*, 101 Ky., 75; *American & Eng. Enc. of Law*, Vol. 28, page 74.

Aside from his age and sickness, three circumstances are relied on by the children to show that Mrs. Sellers unduly influenced him to make the deed.

1. She carried the purse—during his last illness they proved by two or three witnesses that they went to his home to make collections. Mr. Sellers would examine the accounts and hand them to his wife for approval and request her to pay them. She went to the purse, procured the money and paid them as directed.

2. In January, when the children wanted him to divide the farm between them, and offered him \$15 per month, they say he made no objection at first, but that when he called his wife and talked to her about it in their presence—they could not hear the conversation—he turned to them with the remark that it was his property; he was not dead yet; and he was capable and desirous of managing his own affairs.

3. Dr. Lang says that, when requested to prepare the deed, he found in the sick room a printed blank form of deed on the table with pen and ink—everything ready to write it. The argument is that Mr. Sellers had been confined to his room for a week and could not have procured the blank form, and, therefore, his wife was responsible for it being there. Some facts are presented on the motion for a new trial tending to show that Dr. Lang, on reflection, was convinced that his testimony in this respect was erroneous. But, disregarding these facts, and accepting the case as it went to the jury, we do not believe the presence of the blank form, and the fact that he had been sick for a week, is proof either that Mr. Sellers did not, or that she did, make the preparation. If he advised with friends about making the deed more than two months before and spoke to the doctor about writing it, when his sanity is certain, and expressed

a desire to convey by deed rather than devise by will, is it unreasonable that he took steps to perfect the plan and himself procured the blank form before he got sick?

Except the testimony of his children and their children, all the evidence tending to show mental incapacity during his last illness relates to times after the deed was made, and when it is admitted that he was frequently under the influence of opiates. From Dr. Lang's testimony, we gather that, prior to April 6th, opiates were administered to him only on occasions of extreme pain, and the effect was temporary, so that when the pain was relieved and he would come from under the influence of the opiates, he was bright and had a good understanding of everything. It was not until after April 6th that opiates were regularly administered, and even then he possessed his mental faculties when not under their immediate influence. From his testimony there can be no question as to his mental soundness at the time he made the deed. He was introduced as a witness by the children, and his disinterestedness is conceded by all parties.

For the purpose of showing mental incapacity, two instances are shown before his illness. One witness, Sandy Simpson, about 55 years of age, says that he met Mr. Sellers on the road during the previous summer, and that Mr. Sellers called him "Uncle Sandy." While the witness displays no resentment over this, he does say it never occurred before. Other witnesses, even younger, in giving their testimony, repeat conversations they had with Mr. Sellers, and it appears that he spoke to them as "uncle" or "aunt." The fact that these witnesses were not astonished by this familiar form of address indicates that they accepted it as a sign of close intimacy. The other instance is about a witness writing a rent contract for Mr. Sellers when the witness knew that Mr. Sellers had already contracted the land to another party. But the other party testifies that he had surrendered that portion of the land and consented to the making of another contract.

We have reached the conclusion that the weight of the evidence is against the verdict. We are unable to see that his conveyance of the town home to his wife was the result of any influence other than that produced by the children themselves, when they requested him to let them administer on his estate. Through all their married life Mrs. Sellers was kind and attentive. There is no conflict in the evidence as to his affection for her, and

the great service she rendered him. That he appreciated it, his neighbors testify, and, from their testimony, it is clear that the conveyance was not only rational and commendable, but the result of a determination formed months before his last illness.

We would be disposed to give more effect to the verdict were it not for the error in the instructions above referred to. But this being purely an equitable action, the court, out of its discretion, and not under any requirement of law, submitted the issue of fact in order to obtain advisory aid of the jury. Their verdict is not necessarily conclusive and the chancellor may disregard it. *Hill v. Phillips*, 87 Ky., 169; *McIlwain v. Russell*, 11 Ky. L. R., 649; *Ford v. Ellis*, 21 Ky. L. R., 1837; *Morawick v. Martineck*, 128 Ky., 155; *Bannon v. Patrick-Bannon Sewer Pipe Co.*, 136 Ky., 556.

Feeling that the weight of the evidence favors the validity of the deed, we are of the opinion that the lower court should have disregarded the verdict, and the judgment is reversed with directions to enter a decree upholding the deed.

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### **Louisville & Nashville Railroad Company v. Heinig's Administratrix.**

(Decided December 18, 1914.)

#### **Appeal from Whitley Circuit Court.**

1. Master and Servant—Injuries to Servant—Railroads—Collision—Insufficient Rules and Methods of Operation—Negligence.—In an action for damages for the death of an engineer, killed in a wreck alleged to have been caused by defendant's negligence in changing the meeting point without notice to the decedent, and in not having sufficient rules to give proper notice of changes in the meeting points of trains, evidence examined and held insufficient to sustain the charge of negligence.
2. Master and Servant—Injuries to Servant—Railroads—Collision—Negligence of Employes of Waiting Train.—In an action for damages for the death of an engineer resulting from the collision of two trains, evidence examined, and held insufficient to show negligence of the employes of the waiting train in failing to turn the switch, or in stopping that train too near the switch.
3. Master and Servant—Injury to Servant—Railroads—Collision—Topographical Conditions of Meeting Point—Negligence—Evidence.—In an action for damages for the death of an engineer resulting from the collision of two trains, evidence considered and

held insufficient to show negligence on the part of the defendant in placing the switch of the passing track where trains were to meet at a place where the view was obscured by an embankment and trees.

4. **Master and Servant—Injury to Servant—Railroads—Failure to Adopt Block Signal System—Assumption of Risk.**—An engineer of long experience, who has been in the employ of a railroad for a number of years, knows and appreciates the danger growing out of the failure of the company to adopt and have in use the block signal system, and assumes the risk of such danger.
5. **Master and Servant—Injury to Servant—Railroads—Rules—Contributory Negligence—Federal Employers' Liability Act.**—A rule of a railroad company imposing on its conductor the duty of placing himself in a position to hear the meeting point signals, and failing to hear and clearly understand them, to stop his train, is for the benefit not only of passengers but of employes on the train, and the contributory negligence of an employee does not, in an action under the Federal Employers' Liability Act, deprive him of the benefit of the rule where its violation would be negligence as to anyone else on the train.
6. **Master and Servant—Injury to Servant—Railroads—Contributory Negligence—Federal Employers' Liability Act.**—In an action against a railroad company under the Federal Employers' Liability Act, it is only where the employee's act is the sole cause of the injury, and defendant's act is no part of the causation, that defendant is free from liability under the act.
7. **Master and Servant—Injury to Servant—Railroads—Contributory Negligence—Federal Employers' Liability Act.**—Though an engineer killed in a collision be guilty of negligence in failing to give a signal of the meeting point of the two trains, and in failing to have his train under control as the meeting point is approached, yet where the rules of the company require the conductor to place himself in a position to hear the meeting point signals, and failing clearly to hear and understand them, to stop his train, a recovery may be had under the Federal Employers' Liability Act if the conductor, in the exercise of ordinary care could have known that the decedent failed to give the meeting point whistle, or failed to take steps to stop the train, and could have stopped the train in time to avoid the collision.
8. **Master and Servant—Injury to Servant—Railroads—Contributory Negligence—Federal Employers' Liability Act—Evidence.**—In an action for damages under the Federal Employers' Liability Act, based on the negligence of a conductor in failing to comply with the rules of the company requiring him to place himself in a position to hear the meeting point signals, and failing to hear and understand them, to stop his train, evidence considered, and held sufficient to take the case to the jury.
9. **Master and Servant—Injury to Servant—Railroads—Federal Employers' Liability Act—Verdict Based on Sufficient and Insufficient Grounds—Prejudicial Error.**—Since in an action for damages under the Federal Employers' Liability Act, the amount of the

verdict necessarily depends on the amount of negligence attributable to the carrier, a finding based on negligence not authorized by law is prejudicial, even though based also on another and sufficient ground.

HIRAM H. TYE, CHAS. H. MOORMAN, BENJAMIN D. WARFIELD and J. W. ALCORN for appellant.

POPHAM, TRUSTY & ROOSE and J. C. BYRD for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Eugene Heinig was an engineer in the employ of the defendant, Louisville & Nashville Railroad Company. On December 27, 1911, he was killed in a wreck. His widow and administratrix, Catherine D. Heinig, brought this action against defendant to recover damages for his death. The jury awarded damages in the sum of \$21,000, which sum was apportioned equally to the widow and six children of the decedent. The defendant appeals.

At the time of the accident Heinig was the engineer in charge of northbound passenger train No. 32, which collided with southbound passenger train No. 33 at Savoy.

The trial court gave to the jury 19 instructions, in which were submitted for its determination the following grounds of negligence:

1. The meeting point at Savoy was changed without notice to the decedent.
2. Failure to provide sufficient rules, orders, methods and appliances to make the meeting point of the two trains reasonably safe.
3. Failure of the employes of southbound train No. 33 to change the switch in time to prevent the collision.
4. The failure of the conductor to angle-cock the train after the failure of Heinig to indicate by proper signal that he had the meeting point in mind, and intended to stop there.
5. Failure of defendant to adopt and have in use the block signal system.

In the event it found for plaintiff, the jury was told to state in its verdict under which instruction or instructions its finding was made. In response to this direction, the jury stated that its finding was under instructions Nos. 5, 6 and 12. Instruction No. 5 submitted

the question of the conductor's failure to angle-cock the train. Instruction No. 6 submitted the question of defendant's failure to adopt and have in use the block signal system. Instruction No. 12 defined contributory negligence, and told the jury that, under the Federal Employers' Liability Act, contributory negligence did not defeat a recovery, but simply diminished the amount of the recovery, etc.

The petition also charged that defendant was negligent in permitting the trains to meet at Savoy, because of the topographical conditions there existing; and defendant was further negligent because those in charge of the waiting train No. 33 permitted it to stop too near the switch. These grounds of negligence, however, were not submitted to the jury.

Savoy is a telegraph station about a mile from Williamsburg. There is one switch north of Savoy. About 100 feet south of Savoy is the Pine Mountain Spur main. There are two other switches, Nos. 1 and 2, south of the station next to Pine Mountain Spur. Beginning a few feet south of the station, and extending for a distance of several hundred feet, was another track which had a capacity of about 50 cars. The main track curves at a point a short distance below the south switch of this passing track. There are also some trees and a large embankment near the switch point. Prior to November 29, 1911, the Pine Mountain Spur was used as a passing track at Savoy. On that date the trainmaster issued Bulletin Board Order No. 277, the material parts of which are as follows:

"All concerned:—

"Effective at Noon Monday, December 4th, the tracks at Savoy will be used as follows:

"The track south of depot as a passing siding. This track has a capacity of 50 cars, and derail will be removed from this track.

"Track north of depot and parallel with main line, as a northbound storage, having a capacity of 32 cars.

"Track No. 1, next to Pine Mountain main, as a storage for Pine Mountain cars, this track having a capacity of 49 cars.

"Track No. 2, which is parallel with No. 1, as a storage for southbound loads; capacity 49 cars.

"Derailers have been placed at clearance point on north end of Nos. 1 and 2 tracks."

This bulletin was posted at passenger stations and roundhouse at Corbin and Etowa, at the yard offices at Corbin and Etowa, the general foreman's office at West Knoxville, and at the passenger station at Knoxville. For a portion of the time after this bulletin was posted decedent was running between Marysville and Knoxville. Savoy was not on that line. At the time of the accident decedent had been employed on the main line, where Savoy was located, for a little less than two weeks. He was making his ninth single trip. On each trip he passed by Savoy in the daytime. The rules require the engineer to examine the bulletin board before going out on his trips. There was some evidence to the effect that where the time is not sufficient to apprise trainmen of a change, it is customary to send out a special telegraphic bulletin order. On the day of the accident decedent and the conductor of train 32 received at 31 Order to meet No. 33 at Williamsburg and No. 37 at Rockhold. When the train reached LaFollette the engineer and conductor were each handed a 19 order, directing train 32 to meet train 33 at Savoy. In approaching the switch of the passing track at Savoy it was the duty of the decedent to have his train under control. He did not reduce the speed of the train, but at a point about 500 feet south of the switch was going in the neighborhood of 35 miles an hour. Nor did the decedent blow the meeting signal. When the fireman discovered they were approaching the meeting point he "hollered" to Heinig. Heinig then jumped off his seat and blew three blasts of the whistle and drew off all the air. The purpose of these three blasts was to have the other train back up. It was then too late to stop the train, and there was a front-end collision between it and train 33. There was also evidence to the effect that 33 had just come to a stop about four carlengths from the switch. It had probably stopped for 50 or 60 seconds.

It further appears from the rules of the company that, while both conductors and engineers are responsible for the safety of their trains, and must take every precaution for their protection, the general direction and government of the train is vested in the conductor. He is held responsible for its safe and proper conduct, and the men employed on the train are required to yield willing obedience to his proper orders.

Another rule provides:



"90. (f) Enginemen of passenger trains approaching sidings at which they are to meet or be passed by trains of the same or superior class, either by schedule or right, or inferior class trains by right, will immediately after sounding the station whistle (Rule 14 (m), give one short sound of the whistle (Rule 14 (a).

"Conductors will place themselves in position to hear these signals, and, failing to clearly hear and understand them, must stop their trains.

"The proper place for enginemen to sound station whistle (Rule 14 (m) is at a point one-half mile from the head block of first passing siding switch."

There was evidence tending to show that the decedent did not blow either the station whistle or the short whistle for the purpose of indicating that he was approaching a meeting point. There was also evidence to the effect that the conductor did not attempt to angle-cock the train until just about the time of the collision.

Plaintiff also introduced a number of witnesses who testified to the value of the block signal system as a safety device. This system was in use by a number of roads, and if it had not rendered collisions practically impossible, it had materially reduced the number of accidents of that kind. This system is used principally in the North. It is in use on certain portions of defendant's lines. Perhaps only about ten per cent of the roads of the South use this system.

Though the jury based its verdict on the failure of the defendant to equip its road with the block signal system, and the failure of the conductor to angle-cock the train, we deem it necessary, in view of another trial, briefly to discuss the other grounds of negligence relied on.

1. With respect to the claim that the meeting point at Savoy was changed without notice to decedent, and that defendant was negligent in not having sufficient rules to give notice to decedent of the change in the meeting point, the following facts appear: The bulletin making the change in the passing track at Savoy was posted at several places. Every witness who testified saw it at some one of these places. At certain of these places it was seen after the accident occurred. The evidence leaves no doubt that, if the decedent had looked, he, too, would have seen the bulletin. It is no answer to this proposition to say that his conduct shows that he did

not know of the bulletin. It was his imperative duty to look, and he is charged with knowing that which an examination of the bulletin would have disclosed. The charge that the bulletin was itself indefinite, in view of the conditions existing at Savoy, is more imaginary than real. It is true that there are four tracks south of Savoy. A change was made from the Pine Mountain Spur to the track south of Savoy, which was capable of holding 50 cars. Pine Mountain Spur was thereby excluded. Tracks 1 and 2 adjoining the Pine Mountain Spur were likewise excluded, for they were set apart by the bulletin as storage tracks, and provided with derails. This left only the fourth track, which is the one set apart as a passing track. For the purpose of fitting this up as a passing track certain changes were made. Out of all the witnesses examined in the case, no one claims that the bulletin board order was indefinite, or that he did not clearly understand which track was indicated as a passing track. Furthermore, the 19 order which was handed to the decedent and the conductor of train 32, which changed the meeting point of trains 32 and 33 to Savoy, was clear and explicit, and susceptible of only one construction. The passing track at Savoy having been fixed by the bulletin, the direction to meet at Savoy necessarily meant that the two trains should pass each other on the passing track. Being charged with the duty of knowing that which an examination of the bulletin boards would have disclosed, and with the further duty of knowing the contents of the 19 order, which was clear and explicit, we think it necessarily follows that decedent was not only apprised of the meeting point of the two trains, but that the rules and methods provided for notifying decedent of these facts were reasonably adequate for the purpose intended, and would have been effective had it not been for decedent's failure to exercise that degree of care that a person of ordinary prudence would have exercised under similar circumstances. Instead of following the bulletin board order and the 19 order, and instead of complying with the rules requiring him to give the meeting point signal, and to have his train under reasonable control, decedent approached the passing track with his train going at the rate of 35 miles an hour, and when his attention was called to the necessity of turning in at the passing track, it was then too late for him to avoid the accident.

2. There was proof that it was customary for the employes of the waiting train to set the switch so that the approaching train could pass on the siding. It is true that one witness says that the waiting train had stopped for perhaps 50 or 60 seconds when decedent's train approached. All the circumstances, however, show that the waiting train had just come to a stop. Certainly it had stopped only for a few seconds. The statement that it had stopped for 50 or 60 seconds was a mere estimate or guess. No signal of the approaching train had been given until the train was about 500 feet from the switch. The engine of the waiting train had stopped about four carlengths from the switch. The employes of the waiting train, having the right to rely on proper signal of the other train's approach being given, and on the fact that it was under reasonable control, were not required to rush immediately to the switch when they had no reason to anticipate that the other train was so near, or that its speed had not been slackened. When they were apprised of the approach of the other train, and of the speed at which it was going, that train was about 500 feet away, and it was then an absolute impossibility for them to go two or three hundred feet, as the case might be, and change the switch in time to prevent the accident.

For the same reason there is no merit in the contention that the waiting train stopped too near the switch. It was sufficiently far from the switch to clear an approaching train had it taken the siding, and its employes had the right to anticipate that proper notice of the other train's approach would be given in time to enable them to change the switch. The waiting train was on the main track at a reasonable distance from the switch. Even if it had been a little further away, it is doubtful if the accident could have been prevented.

3. Another ground of negligence relied on is that, because of its topographical conditions, Savoy should not have been selected as the meeting place for trains. This position is based on certain evidence to the effect that the switch point of the passing track was near a curve and was obscured to a certain extent by an embankment and trees. We are unable to perceive how defendant was negligent in the respect indicated. On a single-track road it certainly conduces to safety to have as many passing tracks as possible. In rough country, where there are necessarily embankments and trees, it

is not always practicable to place passing tracks out in the open where a clear view may be obtained. Furthermore, the operation of certain trains affects all the other trains on the line, and meeting points of particular trains have to be arranged with regard to other trains. It is, therefore, impossible to fix these meeting points so as to afford an unobstructed view. In addition to these considerations, the topographical conditions were well known to decedent, who had been in defendant's employ for a number of years. Any danger therefrom was known to him, and was necessarily one of the ordinary risks incident to the business in which he was engaged. Furthermore, if the view of the switch point was obscured, and he knew of this fact, there was all the greater reason why he should approach this point with his train under control.

4. By instruction No. 6 the jury were told, in substance, that if they believed from the evidence that for a reasonable time prior to the collision in question the block signal system was in general use on railroads in the United States of like character, in respect to construction and amount of traffic, as that portion of defendant's road complained of, and they further believed that said system was, and was recognized by said railroads and railroads generally, as a device reasonably calculated to prevent collisions of the kind in question, and was used by such railroads for such purpose, and that the use of such block signal at the time and place in question would have prevented the death of Heinig, and that the exercise of ordinary care on the part of defendant for the reasonable safety of its employes in charge of said two trains required the use of said block signals at the time and place in question, and if they further believe that defendant knew, or by the exercise of ordinary care could have known, of such fact a reasonable time before the collision in question, and that defendant's failure to have such block signals, either in whole or in part, caused the collision or the death of Heinig, they should find for the plaintiff. By instruction No. 7 the jury were told, in substance, that if they believed from the evidence that the exercise of ordinary care required the defendant to have block signals, and that the absence of such signals increased the danger of the meeting and passing of said two trains, and if they further believed from the evidence that the increased danger, by reason of the absence of such signals, was

such that a person of ordinary prudence, situated as Heinig was, would not have encountered, and if they further believed from the evidence that on the occasion in question Heinig knew that his train was to meet and pass the other train at the point where the collision occurred, and he also knew of the absence of block signals at such a place, and of the increased danger therefrom, then he assumed the risk of such danger, and the jury should find for the defendant. We deem it unnecessary to discuss the question when or under what circumstances a railroad company is required to adopt the block signal system for the safety of its employes. Here it is admitted that Heinig had been in defendant's employ as an engineer for several years. He was thoroughly instructed in his duties, and passed a creditable examination. It is not shown that defendant was negligent in the operation of the two trains in question, or in the method adopted by it for the operation of trains generally. The means adopted were well known to decedent, and, if obeyed, were reasonably well calculated to secure the safety of employes, including the decedent. There being no Federal Statute requiring railroads to use the block signal system, the common law doctrine of assumed risk applies. *Chesapeake & Ohio Railway Co. v. DeAtley*, 159 Ky., 687; *Seaboard Airline Railway v. Horton*, 233 U. S., 492. Decedent knew that the block signal system was not in use by defendant. Being a practical railroad man of long experience, he also knew and fully appreciated the danger growing out of the fact that it was not in use. Under these circumstances, the risk was one that ordinarily and usually attended the business in which he was engaged, and was necessarily assumed by him. As the question is one about which reasonably prudent men can entertain no difference of opinion, the trial court, instead of submitting the question to the jury, should have so held as a matter of law.

5. The next question concerns the conductor's failure to angle-cock the train, and the question whether or not, if he was negligent in this respect, defendant is liable. In the recent case of *Pennsylvania Co. v. Cole*, 214 Fed., 948, the plaintiff was a rear brakeman and flagman on defendant's eastbound freight train. While his train was standing, about midnight, on the main track to take water, it was run into from the rear by another train consisting of an engine and caboose. The caboose in which plaintiff was asleep was set on fire and plaintiff

thereby severely injured. It was plaintiff's duty to flag the following train, and, instead of doing so, he went to sleep in his own caboose. A recovery was allowed on the ground that the evidence showed that those in charge of the following train could, by the exercise of reasonable care, have discovered the presence of the forward train in time to avoid the collision. In discussing the question, the circuit court of appeals, speaking through Judge Knappin, said:

"But it is strongly pressed upon us that plaintiff's negligence in going to sleep in the caboose while on duty, and thus in failing to flag the following train, was negligence so gross and so proximate in its effect as to preclude all right of recovery. The danger to the interests of the traveling public from failure to enforce such rule is strongly urged. There can be no doubt, at the common law, such would have been the effect of plaintiff's alleged negligence; but the Employers' Liability Act expressly abrogates the common-law rule under which action was barred by the negligence of the plaintiff proximately contributing to the accident and substitutes therefor the rule of comparative negligence. Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery; for, as said in *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S., 114, 122, 33 Sup. Ct., 654 (57 L. Ed., 1096), the direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means that:

" 'Where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.' "

In the case of *Grand Trunk W. R. Co. v. Lindsay*, 233 U. S., 42, the U. S. Supreme Court, speaking through Mr. Chief Justice White, quoted with approval the following language of the Circuit Court of Appeals of the Seventh Circuit:

"If, under the Employers' Liability Act, plaintiff's negligence contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and, if the cause of action is established by showing that the injury resulted 'in whole or in part' from defend-

ant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." *Grand Trunk Western Ry. Co. v. Lindsay*, 201 Fed., 844.

In view of the above decisions it cannot be said that the decedent's negligence, even though the proximate cause of his death, was the sole cause of his death, if, as a matter of fact, the conductor, notwithstanding decedent's negligence, could, in the exercise of ordinary care, have known that decedent had failed to give the meeting point whistle, or had failed to take steps to stop his train, and have stopped the train in time to avoid the collision. Rule 90, above set forth, imposes on the conductor the duty of placing himself in a position to hear the meeting point signals, and, failing to clearly hear and understand them, to stop his train. All the witnesses agree that it was the conductor's duty, when the decedent failed to give the meeting point signal, and failed to slacken the speed of his train, to apply the angle-cock and stop the train. We are not disposed to take the narrow view that the rule in question was adopted solely for the protection of passengers, or solely for the protection of employes who were not themselves negligent. It was intended for the protection of the train and everybody on it. It imposes a duty, the breach of which is negligence, and an employe's contributory negligence does not, under the Federal Employers' Liability Act, deprive him of the benefit of the rule where its violation would be negligence as to anyone else on the train. Notwithstanding the fact that decedent's negligence created a condition where the rules required the conductor to act, the accident might have been avoided if the conductor had, under the circumstances of the case, used ordinary care in the application of the angle-cock. The case is not different in principle from that of *Pennsylvania Co. v. Cole*, *supra*, and we, therefore, conclude that if, as a matter of fact, the conductor was negligent in failing to stop the train, plaintiff may recover, notwithstanding his contributory negligence. On the question of the conductor's negligence, there was sufficient evidence to take the case to the jury.

It follows from what we have said that the case should not have gone to the jury on any other ground than the alleged negligence of the conductor in the respect indicated.

As before stated, the jury based its finding both on alleged negligence of the conductor and the failure of defendant to have in use the block signal system. It may be contended that, as the verdict was proper on one of these grounds, the fact that the jury based its finding on an insufficient ground was not prejudicial. As this action is brought under the Federal Employers' Liability Act, that contention cannot be upheld. That act introduces the rule of comparative negligence. Where the causal negligence is partly attributable to the decedent, and partly to the carrier, his administratrix cannot recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. *N. & W. R. Co. v. Earnest*, 229 U. S., 114, 57 L. Ed., 1096. In comparing the negligence of the decedent and the carrier the jury may have concluded that because plaintiff was negligent in one particular, while the carrier was negligent in two particulars, the negligence of the carrier was much greater than that of decedent, and the carrier should, therefore, be required to bear the greater part of the entire loss. Where, therefore, the amount of the verdict necessarily depends on the amount of negligence attributable to the carrier, a finding based on negligence not authorized by law is prejudicial, even though based on another and sufficient ground.

On another trial the court will exclude all evidence bearing on the grounds of negligence other than that of the conductor, and will submit the case to the jury on that ground alone. Instead of leaving the question of decedent's contributory negligence to the jury, the court will tell the jury that decedent was guilty of contributory negligence, and at the same time direct the jury in conformity to the rule laid down in *N. & W. R. Co. v. Earnest*, *supra*, how to apportion the damages in the event they believe that defendant's conductor was negligent in failing to stop the train.

The foregoing conclusion makes it unnecessary to determine whether or not the verdict is excessive.

Judgment reversed and cause remanded for new trial consistent with this opinion.



**Philadelphia Life Insurance Company v. Farnsley's  
Administrator.**

(Decided January 6, 1915.)

**Appeal from McCracken Circuit Court.**

1. **Insurance—Accident—Suicide Clause—Pleading—Necessary Allegations.**—In an action to recover for the death of the insured on an accident insurance policy providing "suicide, sane or insane, is not covered," it is not necessary to allege that the insured did not commit suicide.
2. **Insurance—Accident—Cause of Death—Pleading—Necessary Allegations.**—In an action to recover for the death of the insured on an accident policy providing indemnity for loss of life "resulting directly and independently of all other causes, from bodily injuries effected through external, violent and accidental means," a petition which alleges that the decedent did meet an accidental death effected through external, violent and accidental means, and that decedent "while crossing a gang plank lying between a barge and steamboat, both vessels lying in the Mississippi river near Cairo, Illinois, accidentally slipped from the plank across which he was walking and fell into the Mississippi river between the boat and barge and was drowned," and thus describes the precise circumstances and cause of the decedent's death, is sufficient to negative the idea that other causes than those specified contributed to the decedent's death, and therefore to dispense with the necessity of alleging that his death resulted directly and independently of all other causes, from bodily injuries, etc.

ROSCOE REED and SANDERS E. CLAY for appellant.

BRADSHAW & BRADSHAW for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.**

On December 4, 1912, the Philadelphia Life Insurance Company issued to Frank R. Farnsley a policy insuring him "against accidental death and dismemberment (suicide, sane or insane, is not covered), disability due to either accident, illness or funeral benefit for death from natural causes as hereinafter respectively defined, limited and specified." The material provisions of the policy are as follows:

**"Total Accident Disability.**

**"(A) At the rate of Seventy Dollars per month, for a period of not exceeding twenty-four consecutive months, against total loss of time resulting directly and**

independently of all other causes from bodily injuries effected through external, violent and accidental means, and which wholly and continuously from date of accident disable and prevent the Assured from performing every duty pertaining to any business or occupation, and require the regular attendance of a physician or surgeon."

"Specific Total Losses.

"(C) Or, if any one of the following specific total losses shall result solely from the injuries described in paragraph A within ninety days from date of accident, the Company will pay, in lieu of any other indemnity,

"For Loss of

"Life, Seven Hundred Dollars (The Principal sum of this Policy)."

On December 23, 1912, the insured was drowned. The Mechanics Trust & Savings Bank, as his administrator, brought this action against the insurance company to recover on the policy. To the petition and the petition as amended, defendant interposed a demurrer, which was overruled. Having declined to plead further, judgment was rendered in favor of plaintiff, and defendant appeals.

The sufficiency of the petition as amended is the only question presented. In addition to certain formal averments, which need not be noticed, the petition contains the following allegations:

"Plaintiff says that on the 4th day of December, 1912, the defendant, the Philadelphia Life Insurance Company, a corporation of Philadelphia, Pa., engaged in the life and accident insurance business, issued and delivered to the plaintiff's decedent its policy of insurance under the terms of which, in consideration of One and 75/100 (\$1.75) Dollars, to be paid monthly by the decedent, and which monthly payment for December, 1912, was paid to the defendant by the decedent, the defendant undertook and obligated itself to pay to the defendant's administrator the sum of Seven Hundred (\$700.00) Dollars in the event of the loss of the decedent's life, resulting directly and independently of all other causes from bodily injury, effected through external, violent and accidental means. Plaintiff says that on the 23rd day of December, 1912, and during the life of said policy, the decedent did meet an accidental death, effected through external, violent and accidental means."

The amended petition is as follows:

"Comes the plaintiff, Mechanics Trust & Savings Bank, administrator of the estate of Frank R. Farnsley, deceased, and for amendment to its petition filed herein says, that on the 23rd day of December, 1912, the decedent, Frank R. Farnsley, while crossing a gang plank lying between a barge and steamboat, both vessels lying in the Mississippi River near Cairo, Illinois, accidentally slipped from the plank across which he was walking and fell into the Mississippi River between the boat and barge and was drowned."

It is insisted that the petition as amended is fatally defective for two reasons: (1) It fails to negative the suicide of the insured, which is an exception contained in the promissory clause; (2) it fails to allege that the death of the insured resulted directly and independently of all other causes from bodily injuries effected through external, violent and accidental means.

(1) It is true that there is a class of cases which make a distinction between provisos and exceptions in insurance policies, in so far as the question of pleading is concerned. Provisos are stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse; and in an action thereon it is incumbent on the insurer to plead them in defense and support them by evidence. Exceptions are clauses taking something out of the general operation of the contract so that the promise is to perform only what remains after the part excepted is taken away; and in actions on policies of insurance containing such clauses, they must not only be negatived by the plaintiff, but he must show by evidence that his case does not fall within the exception. *Sohier v. Norwich Fire Ins., Co.*, 11 Allen, 336. The rule of pleading applicable to such a case is stated as follows:

"If the contract sued on 'contain in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party, relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it together with the exception.' *Com. v. Hart*, 11 Cush., 130."

Thus, where the policy of insurance provides that if the insured is killed while engaged in an occupation classed by the insurance company as more hazardous than that stated in his application, his beneficiary is to receive a smaller sum than otherwise, the plaintiff must allege and prove that the insured was not killed in more hazardous occupation. *American Accident Ins. Co. v. Carson*, 99 Ky., 441, 34 L. R. A., 301, 59 Am. S. R., 473, 36 S. W., 169. The same doctrine was followed in the case of *Tolmie v. Fidelity & C. Co.*, 96 App., Div. 352, 88 N. Y. Supp., 717, affirmed in 183 N. Y., 581, 76 N. E., 1110, where the insurance company agreed to indemnify certain contractors against liability for any damages on account of injuries to third persons caused by the insured or other workmen, but not when the injuries were caused by the sub-contractor or his workmen. It was held that it was the duty of the insured in an action on the policy to allege and prove that the injury for which he sought the company to respond in damages was not caused by the sub-contractor or his workmen. However, it is the generally accepted rule that death by suicide need not be negatived by the pleader. And this is true, we take it, whether the non-liability on account thereof appears in a proviso or an exception, or whether it occurs in the principal clause or in a separate and distinct clause. The reason for the rule is plain. Self-destruction is contrary to the general conduct of mankind. Men love and cling to life with such intensity that the presumption of suicide is utterly abhorrent to the law and cannot be indulged in. *Travellers' Ins. Co. v. McConkey*, 127 U. S., 661, 32 L. Ed., 308, 8 Sup. Ct. Rep., 1360; *Fidelity & Co. Co. v. Love*, 49 C. C. A., 602, 111 Fed., 773; *National Union v. Thomas*, 10 App. D. C., 277; *Travellers' Ins. Co. v. Nitterhouse*, 11 Ind. App., 155, 38 N. E., 1110; *Equitable Life Ins. Co. v. Hebert* (Ind. App.), 76 N. E., 1023; *Mutual L. Ins. Co. v. Wiswell*, 56 Kan., 765, 35 L. R. A., 258, 44 Pac., 996; *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189, 24 L. R. A., 589, 49 A. S. R., 348, 15 So. 388; *Supreme Council R. A. v. Brashears*, 89 Md., 624, 73 A. S. R., 244, 43 Atl., 886; *Cox v. Royal Tribe*, 42 Or., 365, 60 L. R. A., 620, 95 A. S. R., 752, 71 Pac., 73; *Continental Ins. Co. v. Delpeuch*, 82 Pa., 225; *Fisher v. Fidelity Mut. Life Asso.*, 188 Pa., 1, 41 Atl., 467; *Brown v. Sun Life Ins. Co.* (Tenn. Ch. App.), 51

L. R. A., 252, 57 S. W., 415; Mutual L. Ins. Co. v. Simpson (Tex. Civ. App.), 28 S. W., 837; Walcott v. Metropolitan L. Ins. Co., 64 Vt., 221, 33 A. S. R., 923, 24 Atl., 992. We therefore conclude that the petition is not defective because of its failure to allege that the insured did not commit suicide.

(2) The next question presented is whether or not the petition as amended is defective because of its failure to allege that decedent's loss of life resulted, directly and independently of other causes, from bodily injuries, etc. Miscellaneous provision (R) of the policy shows conclusively that death by accidental drowning is covered by the policy. The original petition alleges that the decedent "did meet an accidental death, effected through external, violent and accidental means." The amended petition alleges that the decedent "while crossing a gang plank lying between a barge and steamboat, both vessels lying in the Mississippi River, near Cairo, Illinois, accidentally slipped from the plank across which he was walking and fell into the Mississippi River between the boat and barge and was drowned." The latter allegation shows that death was due to drowning, and that the drowning resulted from decedent's accidentally slipping from the plank across which he was walking, and falling into the river. By detailing the precise circumstances of decedent's death, and the precise cause thereof, we conclude that the allegations of the petition and amended petition are sufficient to negative the idea that other causes than those specified contributed to decedent's death, and are therefore sufficient to dispense with the necessity of a further allegation to the effect that the decedent's loss of life resulted directly and independently of all other causes, from bodily injuries, etc. Manifestly, if the case had gone to trial, and plaintiff had proved the precise facts alleged in the petition and amended petition, these facts would have been sufficient to make out a prima facie case against defendant. It follows that the trial court did not err in overruling defendant's demurrer.

Judgment affirmed.

**Bewley, &c., By et al. v. Moremen, et al.**

(Decided January 6, 1915.)

**Appeal from Meade Circuit Court.**

1. **Contracts—Rescission.**—The ground upon which courts of equity proceed in rescinding or cancelling executed contracts is more narrow, and is to be more carefully trodden than that upon which they refuse specific performance or even decree executory contracts to cancellation; nothing but fraud or palpable mistake will justify the rescinding of an executed contract.
2. **Contracts—Rescission—Actionable Fraud—What Constitutes.**—To establish actionable fraud it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time, or previously existing, and not a mere promise for the future; it must be relied upon by the person whose action is intended to be influenced; and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth.

LEWIS &amp; ASHCRAFT for appellants.

CLAUDE MERCER for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—Affirming.**

In 1906, the appellee, L. B. Moremen, sold to B. F. Bewley ten town lots in Medford, Oklahoma, for \$450 in cash. For purposes of convenience, the property had theretofore been conveyed to John P. Haswell, Jr., by Moremen and wife, and Haswell made the deed to Bewley, although the sale was really made by Moremen and the Rock Island Lot & Land Company, of which Moremen was president. As an inducement to the purchase, Moremen, as president and individually, executed and delivered to Bewley the following paper:

“This is to certify that the Rock Island Lot & Land Company will guarantee an advancement of 100% in value over the purchase price within the next two years from the day of the opening of ten lots this day sold in the town of Medford, Oklahoma, to Mr. B. F. Bewley, and if said lots do not so advance, then the company agrees to refund the sum of \$450, with legal interest thereon from date of payment.

“L. B. MOREMEN, President.”

(Seal)

“March 31, 1906.

“I personally guarantee the above.

“L. B. MOREMEN.”

B. F. Bewley having died, his widow and infant son, who sues by his guardian, brought this action upon the guaranty, in October, 1912, to recover the \$450, with interest from September 19, 1908. A demurrer having been sustained to the original petition, the plaintiffs filed an amended petition on April 30, 1913, offering to reconvey said lots to Moremen as soon as he should pay the plaintiffs the sum of \$450, with interest thereon from March 31, 1906, and praying that the court, through its master commissioner, convey said ten lots to the appellee Moremen for and on behalf of the widow and infant child of B. F. Bewley, and for judgment against Moremen for said \$450 with interest from March 31, 1906. In a second amended petition, filed October 11, 1913, it was alleged that the claim of appellee, L. B. Moremen, that he was the president of the Rock Island Lot & Land Company was false and fraudulent, and was made by him to Bewley for the purpose of deceiving and overreaching Bewley in the sale of said lots, and that it did so deceive said Bewley and cause him to make said purchase. It was further alleged that said lots were worth not exceeding \$150.00 at the time of the sale, and were not worth more than \$190.00 when the petition was filed, and that neither Bewley, during his lifetime, nor the plaintiffs, since his death, had ever had an offer of purchase for any of said lots. This amended petition asked that the deed from Haswell to Bewley for the ten lots be canceled, and that the plaintiffs have judgment against Bewley for the \$450, with interest from March 31, 1906.

There are many irrelevant facts stated in the petition as well as in the answers which were filed during the preparation of the case; but, in view of the final determination of the case upon a demurrer to the amended petition, these irrelevant matters will not be further mentioned.

The court sustained the defendant's motion to require the plaintiffs to elect which cause of action they would prosecute—the one contained in the original petition to recover on the written guaranty, or that contained in the amended petition filed October 11, 1913, which sought a cancellation of the deed to Bewley upon the ground of fraud on the part of Moremen in making the sale, and to recover the purchase price. The plaintiffs elected to prosecute the action for a rescission and recover the

money as set forth in the amended petition of October 11, 1913. A general demurrer to the petition as amended having been sustained, it was dismissed upon a failure to amend; whereupon the plaintiffs appealed.

Stripping the amended petition of its irrelevant and unnecessary matter, it seeks to cancel the deed to Bewley and to recover the purchase money, with interest. The only allegation of fraud contained in the petition relates to the claim by Moremen that he was president of the Rock Island Lot & Land Company, and that said claim was made by him for the purpose of deceiving and overreaching Bewley in the sale, and that it did deceive him and induce him to make the purchase of the ten lots for \$450, which were worth not exceeding \$190 at the time the petition was filed. It is nowhere alleged in the amended petition that the value of the lots, or the kind or quality thereof, was misrepresented to Bewley at any time; nor is it contended that Bewley did not get a good title to the land bought. The original petition states that Bewley made the purchase and paid his money solely upon the written personal guaranty of Moremen that the lots would advance 100% in value within two years from the date of opening. Bewley accepted the deed from Haswell without objection, and did not require any deed from either Moremen or the Rock Island Lot & Land Company, of which he claimed to be president. It being conceded that Bewley's title to the lots is good; that he got the lots he contracted for; and there being no representation of any kind as to the quality or value of the land at the time of the sale, it would seem that plaintiffs had no cause for cancelling the deed on the ground of fraudulent misrepresentation, and that the judgment of the circuit court was correct.

In *Gilbert v. Ledford*, 17 Ky. L. R., 608, 32 S. W., 223, this court said:

"The basis of the claim of appellees is that appellant said he was selling them all his land he owned on Richland Creek, when, as they claim, he at the time owned 40 acres besides the boundary described in the deed. How were the appellees injured by such representation, if untrue, when the appellant conveyed them the entire boundary of land, the lines to which he pointed out when the trade was made?"

In *Neel v. Neel*, 16 Ky. L. R., 195, 26 S. W., 805, this court stated the distinction between the rules applicable



to cases of specific performance and to cases seeking a rescission of an executed contract, as follows:

“The ground upon which courts of equity proceed in rescinding or cancelling executed contracts is more narrow, and to be more carefully trodden than that upon which they refuse specific performance or even decree executory contracts to cancellation. Nothing but fraud or palpable mistake is ground for rescinding an executed contract. (*Graham v. Pancourt*, 6 Casey, 89; *Nace v. Boyer*, 6 Casey, 109.)”

The authorities upon the subject of the cancellation of an executed contract are reviewed at length in *Livermore v. Middlesborough Town Lands Co.*, 106 Ky., 163, where we said:

“To establish actionable fraud, or fraud against which equity will relieve—and, as we have seen, the same rule applies in Kentucky to both classes of cases—it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time or previously existing (and not a mere promise for the future); must be relied upon by the person whose action is intended to be influenced; and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. This is the doctrine deducible from the Kentucky decisions. There are some modifications of this doctrine, but they are chiefly by way of substitution of an equivalent for some one of the essentials necessary to constitute fraudulent misrepresentation; as in the cases where it is held that a fraudulent concealment of a material matter of fact is the equivalent of an actual misrepresentation, and the cases in which a statement made as of personal knowledge, but without knowledge, was held to be equivalent to a statement whose falsity was known.”

There being no claim that any statement was made as to the value of the lots at the time they were sold, or fraud charged, the petition failed to state a case for a cancellation and the demurrer was properly sustained.

Judgment affirmed.

**Cincinnati, New Orleans & Texas Pacific Railway Company v. Dungan.**

(Decided January 7, 1915.)

**Appeal from Harrison Circuit Court.**

1. Trial—Practice.—Where the instructions to the jury have been stricken from the record, the only questions left for consideration are whether the pleadings support the judgment and the verdict is warranted by the proof.
2. Pleading—Discretion of Trial Court.—The only limitation upon the discretion of the trial court in allowing pleadings to be filed is that they must be in furtherance of justice, and must not change substantially the claim or defense.
3. Negligence.—Where guard rails to a bridge or its approaches are clearly necessary for the safety of travelers, a failure to erect or properly maintain them is actionable negligence.
4. Verdict.—A verdict of a jury will not be reversed unless it is clearly and palpably against the weight of the evidence.

J. T. SIMON for appellant.

M. C. SWINFORD and E. H. WEBB for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—Affirming.**

In building its railroad near Hinton Station, in Harrison county, appellant caused it to intersect the Mulberry turnpike road, leaving a cut about 30 feet deep at the point of intersection. The turnpike had been a public highway for many years before the railroad was built; and, in order to preserve the highway, the appellant built a bridge over the cut, with appropriate approaches, protected by suitable guard rails and barriers across appellant's right of way. When constructed, many years ago, these guard rails were strongly built of posts and boards to the height of about six feet.

On the third Sunday in August, 1912, the appellee, Desman Dungan, had attended church in the neighborhood and was returning home about eleven o'clock at night, driving a horse attached to a buggy in which he was riding. When Dungan approached the bridge, and while on the right of way of appellant, his horse became unruly, and refused to cross the bridge; and, in his effort to turn, the buggy was upset and Dungan thrown over the embankment into a ditch at the bottom. He brought

this action to recover damages for his personal injuries, and recovered a judgment for \$2,500.00. The defendant appeals.

As the instructions have heretofore been stricken from the record, the only questions left for consideration are, whether the pleadings support the judgment, and the verdict of the jury is warranted by the proof. *Tinsley v. White*, 21 Ky. L. R., 1151, 54 S. W., 169; *Forest v. Crenshaw*, 81 Ky., 51.

It is insisted that the petition does not state a cause of action.

Under Sub-section 5 of Section 768 of the Kentucky Statutes, it was the duty of appellant to restore the turnpike and maintain its integrity as a highway; and in this connection it is proper to say that appellant in no way denies its duty in this respect.

The rule of law requiring guard rails and barriers to be maintained for the protection of the public is stated in 4 R. C. L., p. 217, as follows:

"If guard rails are reasonably necessary for the safety of travelers and their property in crossing a bridge, then the owners are liable for an injury which is caused by a failure to construct them. The guard rails, furthermore, should be effective for the purpose for which they are constructed. They should be reasonably strong, and maintained so as to withstand the ordinary weights and forces to which they are subjected, and the safeguard should be suited to the character of its ordinary traffic. \* \* \* And the absence of barriers to an approach of a bridge may be the proximate cause of injury even where there is a defect in the equipment of the traveler, as where, for example, his horse was blind and walked off a side of the bridge during a time when the driver lost consciousness."

The same rule is laid down in 5 Cyc., 1101, as follows:

"Where guard rails to a bridge or its approaches are clearly necessary for the safety of travelers, a failure to erect or properly maintain them is negligence, for which the municipality or company charged with the duty to maintain the bridge is liable to a party who, in the observance of due care, is injured by reason of such neglect. This is true, notwithstanding the shying, backing, or unruly and unmanageable conduct of the traveler's horse may have contributed to the accident; the rule being that the liability accrues if the injury would not

have happened had there been a proper and sufficient guard. Whether a bridge is so situated or is such a structure that railings are necessary to make it reasonably safe for travel is usually a question of fact for the jury."

Turning to the petition for the purpose of testing its sufficiency, and disregarding its mere formal allegations, we find it is alleged that appellant constructed the bridge from which Dungan was thrown many years ago, and protected it by a strong fence and barricade leading up to the bridge; that at the time of the injury complained of, and continuously for a long time prior thereto, the appellant company, through the gross carelessness and negligence of its officers, agents and employes, did suffer and permit a gap in said barricade for a distance of about 20 feet to remain down so as to expose the public highway to the precipice; that on the day in question Dungan's horse became frightened and jumped through the said gap and caused Dungan to be thrown violently over the embankment, as above stated, severely injuring him; and that the appellant company knew, or by the exercise of reasonable diligence could have known, the dangerous condition of the right of way.

By an amended petition, tendered and filed at the close of the evidence for the purpose of conforming to the proof, it is alleged that the horse driven by Dungan at the time of the injury was an ordinarily gentle horse, and was carefully driven by Dungan on that occasion.

It is insisted, however, that the court should not have permitted appellee to file the amended petition when he did; and, further, that upon sustaining the motion to file it the trial should have been postponed.

The evidence fully sustained the allegations of the amended petition, and it cannot be said that appellee was in any way surprised or prejudiced by it. Section 134 of the Civil Code of Practice provides that the court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading to be amended by conforming the pleading to the facts proved, if the amendment does not change substantially the claim or defense. In *City of Louisville v. Lausberg*, 161 Ky., 364, it was declared that the only limitation upon the discretion of the trial court in allowing pleadings to be filed is that they must be in furtherance of justice, and must not change substantially the claim or defense. The

amendment in this case was properly filed; it in no way violated the rule above announced.

Without elaboration, it is sufficient to say that the petition charged gross carelessness and negligence upon the part of appellant's servants and agents in permitting the gap in the barrier through which appellee fell to remain open for a long time previous to the accident; that appellant knew, or by reasonable diligence could have known, the dangerous condition on its right of way, and that appellee was carefully driving a gentle horse. Under the rule of law applicable to cases of this character, the petition stated a cause of action.

It is contended, however, that the verdict of the jury is not warranted by the testimony, in that it is excessive. There was ample evidence to sustain the charges of negligence. It is true that Dungan escaped without any broken bones; but it is also true that his injuries were very serious. As above stated, the accident occurred about eleven o'clock on Sunday night. Dungan was found the next morning lying in the ditch at the bottom of the embankment in an unconscious condition. He remained unconscious until four o'clock on the afternoon of the following Wednesday. He was confined to the house for about a month, and evidently sustained severe, and probably permanent, injuries in his back and hip. He was injured in the head and has continuously suffered from his kidneys. The extent of his injuries is yet uncertain. Under this evidence it was the peculiar province of the jury to fix the amount of the recovery; and, as it is not clearly and palpably against the weight of the evidence, we would not be justified in disturbing it. *Bell v. Keach*, 80 Ky., 42; *Thompson v. Thompson*, 93 Ky., 435; *Adams Express Co. v. Tucker*, 161 Ky., 741.

Judgment affirmed.

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### **Carter's Administrator, et al. v. Reynolds, et al.**

(Decided January 7, 1915.)

#### **Appeal from Graves Circuit Court.**

**Wills—Construction—Intention of Testator—Situation of Testator and Circumstances of Making of Will.**—This court has many times written that in the exposition of wills the rule above all rules is

that the intention of the testator shall prevail. In this case an old lady making her home in her declining years with a granddaughter, and possessing only her household goods and a house and lot, the income from which was insufficient for her reasonable maintenance, made a will devising to the granddaughter \$300, and directing that at her death the real estate be sold and the proceeds divided equally among her seven children or their descendants. Held, that the three hundred dollar legacy was a charge upon the real estate.

J. E. WARREN for appellants.

JOHNSTON & WYMAN for appellees.

OPINION OF THE COURT BY JUDGE HANNAH—Affirming.

Mrs. Levitia Carter, a resident of Mayfield, died on March 8, 1910. She had made a will on October 20, 1905, which, after her death, was duly probated.

So much of the will as is here involved reads as follows: "First: I desire that all my just debts be paid, after which I give and bequeath to my granddaughter, Ollie Reynolds, wife of Wash Reynolds, all of my household goods and three hundred dollars in cash; but if she should die before I do, then I desire that her children take said property. Second: It is my further will that my son, J. C. Carter, be appointed my executor with power to make deed of general warranty to any real estate that I may own at the time of my death; and that he use his own discretion as to whether said sale be made public or private; that he have one-seventh of the proceeds of my real estate; and that he pay to my son, A. J. Carter, one-seventh; to my daughter, Elizabeth Austin, one-seventh; to the children of my deceased daughter, Mary Jane Wyatt, one-seventh; to the children of my deceased daughter, Maude Eugene Wyatt, one-seventh; to the children of my deceased daughter, Ada Byron Wyatt, one-seventh; and to my daughter, Sarah Green, one-seventh."

At the time she made this will Mrs. Carter was an old woman and had no property except a house and lot in Mayfield and her household goods; and this was all she possessed at the time of her death.

The house, after Mrs. Carter's death, was rented by the executor, and after his resignation, by the administrator with the will annexed, and the rentals so received were applied to the payment of funeral expenses and

other indebtedness of Mrs. Carter's estate, until March 16, 1914, when the real estate was sold for \$695.00.

The administrator with the will annexed instituted this suit in the Graves Circuit Court to obtain a construction of the will; and the chancellor adjudged that the devise of three hundred dollars to Ollie Reynolds was a charge upon the real estate mentioned, from which judgment the plaintiffs appeal.

At the time she made the will in question Mrs. Carter was making her home with her granddaughter, the appellee, Ollie Reynolds. Her only income was that received from the renting of the house owned by her. She had previously lived with her said granddaughter about three years and paid nothing during that time for her maintenance; when she went back to appellee's the last time she made the will here involved, and thereafter paid to appellee the income received by her from the house mentioned, in consideration of her support. She was quite old, and lived with appellee about five years. The house owned by her rented for ten dollars per month, and this, less the taxes and other charges, was the extent of her income.

The record shows that Mrs. Carter was fully cognizant of the nature and extent of her resources at the time she made this will.

It will thus be seen that unless we impute to Mrs. Carter an intent to bequeath to her granddaughter "in appearance only, and not in reality," no other construction may be placed upon her will except that she intended the three hundred dollars to be a charge upon her real estate.

It is true that the general rule is that an insufficiency of assets will operate to abate a general legacy; but this rule would be inapplicable if it was the intention of Mrs. Carter that the three hundred dollar legacy to her granddaughter should be paid out of the proceeds of the real estate; and we are unable to understand that Mrs. Carter could have expected it to be paid in any other manner or from any other source. She had no such sum in her possession when she made the will; nor had she any reasonable expectation, so far as the record shows, of having such sum when she should die, for the little income available to her was insufficient for a reasonable maintenance, hence there remained no possibility of any accumulation thereof.

So it must either be said that Mrs. Carter intended that this three hundred dollar legacy should be paid out of the proceeds of her real estate, or else she did not intend that her granddaughter should have it; and this latter we are unwilling to believe.

If Mrs. Carter intended her granddaughter, with whom she made her home in her declining years, and whom she mentions first in her will before her own children, to have this three hundred dollars at all, she certainly intended it to be paid out of the proceeds of her real estate; and that such was her intention we do not doubt.

This court has many times written that in the exposition of wills the rule is that the intention of the testator shall prevail.

The chancellor has so construed the will in question; and his finding we approve.

Judgment affirmed.

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### Combs, et al. v. Frick Company

(Decided January 7, 1915.)

#### Appeal from Perry Circuit Court.

1. Pleading—Filing Answer—Computation of Time.—Where defendants were given until the twenty-second day of the term to file their answer, and they tendered it on the twenty-second day, they were in time.
2. Pleading—Set-off and Counter-claim—Unliquidated Damages.—Where plaintiff, a foreign corporation having no property in this State, brings an action upon notes given for machinery sold by it, the purchasers may interpose by way of recoupment a demand for unliquidated damages arising out of the transaction in question.
3. Pleading—Motions—Striking Out Pleading or Defense.—Where defendants having failed to file their answer within the time prescribed by the Code, were put upon terms, and thereafter tendered and filed an answer which was insufficient, the court had power to strike it from the record.

NAPIER & TURNER, THOMAS B. MCGREGOR and J. B. EVERSOLE for appellants.

MILLER & WHEELER for appellee.

OPINION OF THE COURT BY JUDGE HANNAH—Affirming.



On November 13, 1912, R. B. Combs and J. C. Combs executed a written order to the Frick Company, directing it to ship from Waynesboro, Pa., on or about December 1, 1912, to them at Typo, Perry county, Kentucky, a sawmill and other machinery and fixtures. By the terms of the order, they agreed to pay for the machinery \$246.00 in cash on delivery thereof, and five notes in the sum of \$220.00 each. The notes were to be secured by a mortgage on the machinery, and on such other property as might be agreed upon.

The machinery so ordered was delivered to the purchasers on or about December 30, 1912; and on that day they gave the Frick Company their five notes in the sum of \$220.00 each, secured by a mortgage executed, acknowledged and delivered by them on that date, covering the machinery so purchased and certain real estate. They also paid the \$246.00 in cash.

On June 13, 1913, a default in the payment of the note first maturing having, by the terms thereof, precipitated the maturity of the whole of the indebtedness, the Frick Company instituted this action in equity in the Perry Circuit Court to recover upon the notes and to enforce the mortgage lien.

On the thirteenth day of the appearance term, August 1913, of the court, defendants filed a special demurrer to the petition, which the court overruled; and "defendants were given *until* the twenty-second day of the term in which to plead."

On the twenty-second day of the term the "defendants filed their answer and set-off, to which plaintiff objected, and moved the court to strike same from the record." This motion the court sustained and struck the answer and set-off from the record, over the objection of the defendants. The court then rendered judgment in favor of plaintiff for the notes sued on, and ordered a sale of the mortgaged property in satisfaction of the judgment. Defendants appeal.

1. The objection of plaintiff to the filing of the answer and set-off by the defendants was two-fold. Plaintiff insisted, first, that the pleading was not tendered in time.

As to this contention, it was held, in *Newport News R. Co. v. Thomas*, 96 Ky., 513, 16 R., 706, 29 S. W., 437, that when time is given until a day certain to file a bill

of exceptions, if it is filed on or before that day, it is in time.

The defendants were given until the twenty-second day of the term to plead, and having tendered it on that day, they were in time.

2. The second objection of plaintiff to the filing of the answer and set-off by defendants was that it failed to state facts sufficient to constitute a defense, or a cause of action against plaintiff by way of counter-claim or set-off.

It is suggested that the demand attempted to be pleaded in this answer and set-off, being one for unliquidated damages, could not properly be interposed by the defendants in this action. But it was alleged by the defendants that the plaintiff was a foreign corporation and that it had no property in this State, and, in such case, a demand for unliquidated damages was a proper ground for recoupment. *Forbes v. Cooper*, 88 Ky., 285, 10 R., 865, 11 S. W., 24; *Abernathy v. Myer-Bridges Company*, 100 S. W., 862, 30 R., 1236; *Bates v. Reitz*, 157 Ky., 514, 163 S. W., 451.

So the question is, whether the pleading was sufficient to state a cause of action against the plaintiff; and upon this sufficiency rests the right of the defendants to file it at the time it was tendered. It is true that as a general rule the sufficiency of a pleading as stating a cause of action or defense is to be tested upon demurrer; but in this case the defendants having failed to make defense within the time prescribed by the Code, were put upon terms as to the filing of their answer, and when it was tendered, and its insufficiency was urged as an objection to the filing thereof, the court, in its discretion, had the power to refuse to permit it to be filed, or after it was filed, had the power to strike it for insufficiency. 31 Cyc., 619.

Briefly stated, the purported cause of action against the plaintiff, which was set up in the answer and set-off, or really counter-claim, in question, was that the plaintiff had agreed to deliver the machinery mentioned to the defendants at Typo, Kentucky, on December 1, 1912; that it failed to comply with this agreement; that the machinery did not reach the defendants until about thirty days after its delivery was promised; that, because of this delay, the defendants were caused to lose thirty days' time, with men and teams idle at great expense to

them; and that they were thereby damaged in the sum of one thousand dollars.

But the written order which was sent by the defendants to the plaintiff and was accepted by it, and under which the machinery was delivered by plaintiff to defendants, does not stipulate that the delivery was to be made to defendants at Typo on December 1, 1912. It provides that the machinery ordered was to be shipped from Waynesboro, Pa., on or about December 1, 1912.

The defendants did not deny their execution of this written contract; and it was the only contract between the parties. Defendants did not in any manner seek to avoid or modify it. Nor was it charged that plaintiff failed to make shipment from Waynesboro, Pa., on or about December 1, 1912, as it agreed to do. In fact, the pleading shows no breach of any of the covenants of the contract entered into between the defendants and plaintiff.

Moreover, the damages sought were purely special in their nature, and the pleading charges no such communication of the circumstances as is necessary to impose liability upon the plaintiff for damages not the result of an ordinary breach of the contract, assuming it to have been made as alleged by the defendants. *Pulaski Stave Company v. Millers Creek Lumber Company*, 138 Ky., 372.

The pleading in question failed to state any matter available to the defendants either by way of defense or ground of recoupment against plaintiff, and the trial court properly struck it from the record.

Judgment affirmed.

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### **Braun's Executrix v. Williams**

(Decided January 7, 1915.)

Appeal from Daviess Circuit Court.

**Appeal.**—There is no error in the record and no point out of which to make a syllabus.

**R. E. WATKINS** for appellant.

**W. T. ELLIS** for appellee.

## OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

In 1895 the appellee Williams recovered a judgment against J. W. Braun, upon which execution was issued in 1896, and returned "no property found." In February, 1913, Braun died, leaving a will in which he nominated his wife, the appellant, as executrix. After this payment of the judgment debt of Williams, which had been properly verified, was demanded and refused, and thereupon, in November, 1913, Williams brought this suit against the executrix, setting up that ample estate had come into her hands to pay the debt and asking for a settlement of the estate and that he have such orders as might be necessary to enforce the payment of his claim. It was further averred that J. W. Braun, in August, 1901, and at divers other times, had acknowledged the justice of the judgment debt and promised to pay it.

To this suit the executrix filed a general demurrer and also a motion to require the plaintiff to elect whether he would prosecute his action on the original cause, to-wit, the judgment, or on the new promise alleged to have been made in 1901, both of which were properly overruled by the court.

On December 17, 1913, the executrix filed her answer, in which she stated that she had paid all of the claims presented against the estate of her husband except the Williams claim, and sought to defeat the collection of this on the principal ground that it was barred by limitation. The answer contained other matter that we do not think it necessary to notice.

To this answer a reply was filed, and the record shows that, without objection, the case was set down for trial for December 30th, and on this day, when the evidence, without objection, was heard by the court, it was adjudged that the claim asserted by Williams was a just claim and that he had promised to pay the same in August, 1901, and at other times, and the executrix was ordered to pay the claim within 30 days thereafter, and upon her failure to do so, the court reserved the right to enter a judgment against her as executrix.

It further appears from the record that in January, 1914, the transcript of the evidence heard by the court was tendered, and thereafter, by further order of court, was signed by the judge and filed. It is further shown that the executrix having failed to pay the debt after being again ruled to do so, judgment was entered against

her as executrix for the amount of the debt, to be levied on assets unadministered in her hands.

On this appeal we are asked to reverse the judgment for error of the court in prematurely forcing the executrix into trial, and in permitting incompetent evidence to be heard. The record does not show that any objection was made to the trial of the case, and the evidence of the acknowledgment of the justness of the debt and the promise to pay it was not only competent, but as complete and satisfactory as evidence could well be.

The judgment is affirmed.

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**Bath County, By et al. v. Denton, et al.**

(Decided January 7, 1915.)

**Appeal from Bath Circuit Court.**

**Fiscal Courts—Power to Control Property of the County—Conflict of Authority With Jailer.**—Under Section 1840 of the Kentucky Statutes, the fiscal court has jurisdiction to regulate and control the fiscal affairs and property of the county, and when it leases property of the county that is not needed for public business or purposes to private persons, the jailer of the county cannot, by an action in ejectment, dispossess the lessees without the consent of the fiscal court. The authority of the fiscal court in the conduct of the business of the county is superior to that of the jailer, except in cases in which the jailer is by statute given paramount authority.

W. S. GUDGELL for appellant.

W. B. WHITE and G. C. EWING for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

Robert E. Duff, the jailer of Bath county, brought this suit in ejectment against the appellees, Denton and Conner, to recover from them the possession of two lots which were a part of the public square in Owingsville, the county seat of Bath county, on which square is situated the courthouse and other public buildings of the county.

In an amended petition it was averred that the two lots in the possession of appellees were contiguous to the county jail, and their present use by the appellees was a menace to the safety of the occupants of the jail and they were necessary to the jailer for the convenience and enjoyment of the property in which he lived.

The separate answers filed by the appellees, after admitting that the lots were owned by Bath county, set up that one of the lots for many years prior to 1902 had been occupied by the appellees and their lessors by a blacksmith shop and the other by a livery stable; that in 1902 the fiscal court of Bath county, by orders of court duly made and entered, leased these lots to Coon and others for a period of sixteen years, in consideration of an annual rental charge, with the privilege in the lessees of sub-leasing the property, which privilege the lessees exercised by sub-letting it to the appellees.

If the jailer did not have authority to question in this action the power of the fiscal court to make the leases mentioned, then the decision of the lower court in overruling demurrers filed to the answers, which, in effect, amounted to a holding that the action could not be maintained, was correct, and the judgment should be affirmed, as it is not disputed that the appellees are holding the property under authority of the leases.

Section 1840 of the Kentucky Statutes provides, among other things, that the fiscal court shall have jurisdiction "to regulate and control the fiscal affairs and property of the county," and it is the contention of counsel for appellees that the fiscal court had, by virtue of this statute, jurisdiction and power to lease these lots in the manner stated, and this being so, any action to oust the tenants from possession must be brought in the name of or by the authority of the fiscal court, and the jailer not having this authority, had no right to institute or maintain the action.

On the other hand, the argument in behalf of the jailer is that, under Section 3948 of the Kentucky Statutes, the jailer is made the superintendent of the public square at the seat of justice and clothed with "power and it shall be his duty to institute and carry on the appropriate civil procedure in the name of the county to recover possession of and for injury to, or intrusion or trespass which may be committed on any of the county property named in this chapter," and so he was vested with authority to maintain this action without asking either the advice or consent of the fiscal court.

The fiscal court is the governing authority in county affairs, and has by the statute general control of all matters that concern the county, unless the right of control has been lodged by statute in some other officer or body,

and there is really no conflict between the authority granted to the fiscal court and the authority granted to the jailer under the statutes mentioned. It is true the jailer has a right, under Section 3948, to institute such proceedings as may be necessary to recover possession of property of the county and damages for any intrusion or trespass which may be committed on or against it. But this does not mean that he has power to override the authority of the fiscal court, or that when the fiscal court undertakes to control in such manner as its judgment and discretion may dictate the property of the county, the jailer may nullify its action by independent proceedings initiated on his volition. The power of the fiscal court in the exercise of authority within its jurisdiction is superior to the authority of the jailer, and the jailer cannot nullify its authority in the manner attempted in this action.

In *Owen County v. Green*, 129 Ky., 750, it was contended that the jailer of the county and not the fiscal court was the proper party to institute an action to recover property of the county, but we said, in construing sections 1840 and 3948 of the Kentucky Statutes, that while Section 3948 "gives the jailer the power and makes it his duty to institute actions to recover possession of public county buildings, it was not intended to deprive the fiscal court of the power to regulate and control these buildings and institute such actions with reference thereto as it might deem necessary."

It is entirely probable that many counties in the State own lots and other real estate not occupied by public buildings, or needed for public purposes, that are used by private persons under contract with the fiscal court, and it was certainly not contemplated that the jailer of the county might dispossess persons to whom the fiscal court had leased such property.

Counsel for appellant offer the argument that fiscal courts have no power to lease public property to the detriment of the public good or that has been set apart for or that is needed for public purposes. But the question of the jurisdiction or power of the fiscal court to lease or dispose of property set apart for public use is not properly before us in this record, and so we will not consider it. The only matter here presented is the right of a jailer to eject persons from property they are holding under a lease from the fiscal court.

This we think the jailer cannot do, and the judgment is affirmed.

**Paducah Traction Company v. Tolar.**

(Decided January 7, 1915.)

**Appeal from McCracken Circuit Court.**

1. **Carriers—Street Railway Companies—Duty Toward Passengers.**—Conductors on street cars are under a duty to passengers to exercise care to protect them from danger whether this danger arises from the negligence or thoughtlessness of the passenger or other causes.
2. **Carriers—Duty Toward Passengers Alighting From Cars—Care Required of Conductor.**—Where a passenger on a street car, in the night time, believing the car had stopped or was about to stop, when in fact it was running at a high rate of speed, manifested a purpose to get off and did get off in the presence of the conductor, it was his duty, if he knew the purpose of the passenger, to make a reasonable effort to warn the passenger of the danger, and his failure to do this was negligence on the part of the Company, for which the passenger, who was injured when he stepped from the car, was entitled to damages.
3. **Carriers—Duty Toward Passengers.**—A conductor or person in charge of a street car, if he discovers a passenger in the act of doing something that will place him in peril, is under a duty to warn the passenger of the danger, and his failure to do so is actionable negligence.

WHEELER & HUGHES for appellant.

BERRY & GRASSHAM and L. B. ALEXANDER for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

The appellee, as plaintiff, brought this suit against the traction company to recover damages for personal injuries sustained, as she alleged, by the negligence of the conductor on a car on which she was a passenger.

The petition as amended charged, in substance, that, desiring to alight from the car on which she was riding at the intersection of Third and Jackson streets, she so informed the conductor, who rang the bell for the car to stop, and then went back to his place at the rear end of the car where the conductor was accustomed to stand. That soon after this she left her seat and went to the rear end of the car for the purpose of getting off, and, believing that the car had stopped when it was in fact moving, she attempted to alight and was thrown to the ground, receiving the injuries complained of. That at the time it was dark and the car was moving so smoothly that she could not tell that it had not stopped.



She further averred that when she went to the rear platform of the car for the purpose of alighting, she passed immediately by the conductor, who stepped out of her way for the purpose of allowing her to get off, when he knew that the car was running, and negligently and carelessly allowed her to walk from the car while it was in motion without warning her of the danger or giving her notice that the car had not stopped.

The answer of the traction company was a traverse and a plea of contributory negligence, accompanied by the charge that the appellee stepped from the car while it was in full motion under the following circumstances: "While said car was about the middle of the block between two streets, without warning or notice to the officers in charge of the car, the plaintiff left her seat and immediately left said car while the same was in motion, as she knew at the time."

The appellee, in her own behalf, testified that when she told the conductor that she wanted to get off, he pulled the bell cord, and she got up from her seat and started out, thinking the car was about to stop. That when she got to the rear end of the car the conductor was standing there and facing her when she went down the steps for the purpose of getting off. That she did not know the car was running and the conductor did not do or say anything to give her notice that the car was running or that it was dangerous to get off.

T. F. Kettler, a passenger on the car, said, in substance, that appellee arose from her seat in the middle of the car, while it was in full motion, and in going out of the car to get off went by the conductor, who stepped out of her way so that she could pass.

George W. Muller, a witness for the traction company, who was also a passenger on the car, said that when appellee got off the car it was running ten or fifteen miles an hour and near the middle of the block.

J. F. Muller, another passenger, gave, in substance, the same evidence.

W. A. Strong, the conductor, testified that appellee said to him: "I want to get off at Jackson. She came to the door; I rang the bell. I said, 'You can get off at Ohio.' She said, 'I want off here,' and stepped right off." He further testified that he did not know she was going to get off, and that the car at the time was running ten or fifteen miles an hour. That he attempted to

grab her as she left the car, but could not do so. That he did not know she intended to get off.

Briefly re-stated the evidence for the plaintiff was that when she notified the conductor that she wanted to get off, he rang the bell, and, thinking that the car was about to stop, she went to the rear end for the purpose of getting off, passing immediately by the conductor, who knew the car was running, and that she intended to get off, but he did not give her any warning or notice of the danger or attempt in any manner to prevent her from getting off. That at the time it was dark, and when she stepped off she did not know the car was running.

While the evidence for the traction company is that when the conductor rang the bell to notify the motorman to stop the car at the next crossing, the appellee got up and walked off the car when it was running ten or fifteen miles an hour, without giving any notice to the conductor of her intention to get off, and he did not know her purpose in time to prevent her from getting off.

With the evidence in this condition, the court, omitting the instruction on the measure of damages, told the jury in instruction number one that "If you shall believe from the evidence in this case than on the occasion complained of by the plaintiff, and when she undertook to get off the defendant's street car on said occasion, and before same had been stopped, that the conductor in charge of said street car knew that said car was still in motion, or by the exercise of ordinary care could have known it, and that plaintiff did not know that said car was in motion, but believed same had been stopped, and that said conductor saw plaintiff when she was making an effort to get off of said car in time to have warned her that said car had not stopped, or was still in motion, and thereby prevent her from stepping from said moving car, and failed to do so, then the defendant is chargeable with negligence, in this case, and the law is for the plaintiff, and you will so find."

And in instruction number two the court told the jury: "But the court further instructs you that defendant's conductor was not bound to anticipate that plaintiff would attempt to alight from said moving car, and unless you shall believe from the evidence that defendant's conductor in charge of said car discovered plaintiff's intention to alight from said car, while same was in motion, and after so discovering said intention, said con-

ductor could have, by ordinary care, warned the plaintiff in time to have prevented her from stepping from said car, and failed to do so, then the law is for the defendant, and you will so find."

And in instruction number four the jury were told: "The court further instructs you that if you believe from the evidence in this case that at the time and place complained of by plaintiff, she left her seat in defendant's car and attempted to get off of said car while same was in motion, and which she knew to be in motion at the time, and at a place where she knew it did not stop to discharge passengers, and this without any notice or warning to defendant's conductor in charge of said car, then the law is for the defendant, and you will so find."

Under the evidence and instructions the jury returned a verdict for small damages, and judgment went accordingly.

That the appellee left the car about the middle of the block while it was running at a high rate of speed, is not disputed, and so, unless the conductor of the car was under a duty to protect the appellee if he knew she was about to leave the car, the company is not liable. If, however, the appellee did not know the car was running, and the conductor knew that it was—and he testifies that he did—we think it was his duty, if he knew that appellee was about to leave the car, to warn her of the danger in so doing.

Conductors on street cars are under a duty to passengers to exercise care to protect them from danger whether this danger arises from the negligence or thoughtlessness of the passenger or other causes. The duty of a carrier does not stop with protecting passengers from the negligence or misconduct of its employes, other fellow passengers or strangers, but extends to protecting them from perils created by their own conduct, when notice of the danger to which they are subjected is brought to the attention of the persons in charge of the train or car; *Louisville Ry. Co. v. Wilder*, 143 Ky., 436. The passengers on street cars are under the care and, in a measure, in the custody of the conductor, and he must not knowingly permit them to be injured if by the exercise of ordinary care he can prevent it.

It is true that it is quite a common and usual thing for passengers to leave cars before they stop and to get on them before they stop, and, generally speaking, passen-

gers who get on or get off cars that they know are running, take the risk of any injury that may happen to them, subject to the qualification that it is a question for the jury to decide whether, considering the age and discretion of the party so alighting and the surrounding circumstances, it was negligence or lack of ordinary care on his part to try to get off the car. *Ford v. Paducah City Ry Co.*, 29 Ky. L. R., 752; *Louisville Ry. Co. v. Williams*, 30 Ky. L. R., 493.

But here, when the appellee attempted to alight the car was in the middle of the block and running at a rate of speed that made it necessarily dangerous, especially for an elderly woman, as appellee was, to attempt to get off. And while the conductor, in the exercise of ordinary care, might not be required to take notice of the action of a passenger able to take care of himself in alighting from a car running at a slow rate of speed, it is perfectly obvious that when a conductor sees a middle-aged woman in the act of getting off a car running at ten or fifteen miles an hour, he cannot help but know that it is a most unusual and uncommon thing to do, as well as extremely dangerous, and under conditions like this the duty the conductor is under to protect the passengers requires that he shall make reasonable effort to prevent the passenger from getting off, if he knows his purpose. A conductor cannot shut his eyes and say he did not see or know what was going on when his duty in looking after the safety of his passengers requires him to see and know, and, according to the evidence of appellee, the conductor could not have avoided knowing that when she walked by him her purpose was to get off.

In *South Covington & Cincinnati Street Ry. Co. v. McCleave*, 18 Ky. L. R., 1036, a passenger whose arm was protruding through an open window was injured when it came in contact with the girders of a bridge. On the trial of the suit against the railway company to recover damages, the court told the jury that they should find for the plaintiff if they believed from the evidence that the conductor in charge of the car saw the plaintiff with his arm out of the window of the car so as to be in danger of being struck by any part of the bridge in time to have warned him of his peril before the accident occurred, and failed to do so. In approving this instruction, the court said:

“No degree of contributory negligence on the part of even a trespasser will release a person in charge of

a train or single car, whether operated by steam or electricity, from the legal obligation to use reasonable effort to avoid injuring him if his peril is discovered in time to do so, and we do not see why the conductor of an electric or steam car should not be held to the duty of giving warning to one of his passengers when he actually sees him in a position or place on the car of peril to life or limb."

In *Blue Grass Traction Co. v. Skillman*, 31 Ky. L. R., 480, Mrs. Skillman, who was a passenger on a street car in the night, supposing that the car had stopped, when in fact it was running, stepped off and was hurt. In sustaining judgment for the plaintiff, under evidence somewhat similar to the evidence in this case, the court said:

"The conductor was bound to know when the people followed him to the door, after he had announced the station and opened the door for them, that they were coming out of the car for the purpose of alighting, and it was incumbent upon him to warn them of the danger; for he knew the car had not stopped, and he could not but know from their actions that they were coming out to get off. Mrs. Skillman passed right by him as she went down the steps to get off; he could see plainly that she was going to get off if he had paid attention to what was going on; it was incumbent upon him, under the circumstances, to pay attention, as it was dark and the car moving so smoothly that a person would not perceive the danger."

If appellee went out of the car in the manner related by her, then it was a question for the jury to say whether she knew the car was running and whether the conductor should not have warned her of the danger and endeavored to protect her; and if the jury believed her version of the affair, as evidently they did, it was their right to award her damages.

On the other hand, if, as stated by the conductor, he did not know her purpose or have opportunity to arrest her action, the company was not guilty of any negligence, and there should, and doubtless would, have been a verdict in its favor had the jury accepted the conductor's story of the accident.

The instructions, we think, aptly presented the law of the case as we understand it, and the judgment is affirmed.

**Cheek v. Commonwealth.**

(Decided January 7, 1915.)

**Appeal from McCracken Circuit Court.**

1. **Criminal Law—Indictment—Sufficiency on Appeal.**—Where an indictment charging a public offense is not demurred to, and no motion in arrest of judgment is made in the court below, its sufficiency can not be raised for the first time on appeal.
2. **Criminal Law—Instructions—Grounds for New Trial.**—Errors in instructions given in a criminal case can not be considered on appeal unless included in the motion and grounds for a new trial.
3. **Criminal Law—Burglary—Evidence—Sufficiency.**—On a prosecution for burglary, evidence considered and held sufficient to sustain a conviction.

HENDRICKS & NICHOLS for appellant.

JAMES GARNETT, Attorney General, and ROBERT T. CALDWELL, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Street Cheek was convicted of burglary and appeals.

The only grounds assigned for a new trial in the court below are: (1) the verdict is against the evidence, and (2) the verdict is against the law.

It is insisted here that the indictment is insufficient and that the instructions are erroneous.

The indictment charges a public offense. It is merely insisted that the offense is imperfectly pleaded. The indictment was not demurred to, nor was there any motion to arrest the judgment. That being true, the sufficiency of the indictment cannot be considered when raised for the first time in this court. *Baldridge v. Commonwealth*, 28 Ky. L. R., 33.

Error in the instructions was not assigned as ground for a new trial. While it is true that it is not necessary to except to instructions in a criminal case in order to question their sufficiency, for the reason that it is the duty of the trial court to give correctly all the law of the case, yet it is equally well settled that errors in the instructions will not be considered on appeal unless relied on as a ground for new trial. *Buckles v. Commonwealth*, 113 Ky., 799; *Commonwealth v. Thompson*, 122 Ky., 501.

The only question remaining is, whether or not the verdict is flagrantly against the evidence. The facts developed by the evidence for the Commonwealth are as follows:

Early one morning in September, 1914, Miss Rosa Lee Petter, who, together with her father, occupied a residence in Paducah, was awakened by a noise in the room. She saw the figure of a man, and called to her father that there was a man in the house. Her father responded to the call. He heard the man running down the steps, and heard him come in contact with a large pedestal, which sounded like the whole house was coming down. They were unable to recognize the intruder. The sash and screen of one of the windows were raised. They found tracks near the window leading out through the yard to an alley. About five o'clock on the same morning appellant was arrested at his home on some minor charge. Appellant was in the back room and lying on a cot with no cover over him. When the burglary was reported to the chief of police, he removed the shoes of appellant and took them to the scene of the alleged crime. The shoes fitted the track near the window, and also the other tracks, with the exception that the tracks were about one-eighth of an inch longer. The shoes were run down at the heel, and the tracks indicated this condition. The tracks also showed the nail holes in the rubber heels. The holes in the tracks corresponded with the holes in the heels. Near the side of the house they had been unloading some coal. The tracks appeared very plain in the coal dust. These tracks corresponded to the shoes in every respect, with the exception that they were one-eighth of an inch longer.

Defendant testified that he never left his room, but remained there all night. He also proved by others that he was there during the entire night, though the evidence shows that he might have gone out without the others knowing it.

While it is true that appellant was not identified, and no property belonging in the house was found on him, we cannot say that the verdict is flagrantly against the evidence. The heels of the appellant's shoes were run down. This condition appeared from the tracks. The impression in the tracks corresponded to the nails and the holes in the shoes. The jury heard this evidence and observed appellant's demeanor while on the stand, and

they were therefore in a better position than we are to pass on the question of his guilt.

Finding no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

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**Mrs. Jennie Campbell v. Mobile & Ohio Railroad Company.**

**R. L. Campbell v. Same.**

(Decided January 8, 1915.)

**Appeals from Hickman Circuit Court.**

1. **Trial—Credibility of Witness—Question for Jury.**—In a common law action, tried by a jury, the credibility of a witness is for the jury, and neither the trial judge nor the Court of Appeals has a right to reject the evidence of a witness merely because his demeanor on the stand is such as to induce the belief that he is not telling the truth.
2. **Damages—Stock Killed by Train—Evidence—Peremptory.**—In an action to recover damages for two horses alleged to have been killed at Campbell's crossing about 3:20 A. M., on Saturday, September 16, 1911, the testimony of a witness that on a Saturday morning in September, 1911, between the hours of two and three o'clock, he saw two horses struck and killed by defendant's train at said crossing, and that the engine did not whistle for the crossing, held sufficient to take the case to the jury, and that the trial court erred in peremptorily instructing the jury to find for defendant.

JOE W. BENNETT and BENNETT, ROBBINS & THOMAS for appellants.

E. T. BULLOCK and KANE & BULLOCK for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing in each case.

These two actions were heard together below and will be considered in one opinion.

Appellant, R. L. Campbell, was the owner of a horse, and appellant, Jennie Campbell, was the owner of a mare, which were killed about 3:20 A. M. on September 16, 1911, by a fast passenger train, owned and operated by appellee, Mobile & Ohio Railroad Company.

Appellants instituted two actions to recover damages. At the conclusion of the evidence in each case the trial



court directed a verdict in favor of the railroad company. On appeal to this court the judgment in each case was reversed because of the failure of the railroad company to negative the negligence imputed to it by Section 809, Kentucky Statutes, by proving that the statutory signals, required by Section 786, Kentucky Statutes, for the road crossing at which the stock were killed, were properly given. These cases were subsequently dismissed without prejudice. Afterwards the present actions were filed in which each of the appellants sought to recover damages in the sum of \$250. The two cases were tried together in February, 1913, and, at the conclusion of the evidence, the trial court directed verdicts in favor of the railroad company. From the judgments entered on the verdicts these appeals are prosecuted.

On the last trial the evidence for the railroad company was to the effect that the stock were killed about 3:24 A. M. on Saturday, September 16, 1911, by a passenger train running at the rate of about 55 miles an hour. When the train was a few feet from the crossing the fireman told the engineer to look out for stock. At that time some horses were running from the east. Before the engineer could do anything the train collided with the horses. The engineer testified that he whistled for the road crossing when about a quarter of a mile away. There was further evidence to the effect that there was a curve in the track near that point, and the furthest point away from which the crossing could be seen was about 406 feet distant.

Appellants introduced a witness by the name of Stanfield, who stated that during the month of September, 1911, he spent one night at his sister's. The next morning, between two and three o'clock, he started to Moscow. When he approached the Campbell crossing he saw two horses on the crossing about 35 yards distant. The train struck the horses and killed them. The engineer did not whistle for the crossing. There was further evidence to the effect that an object on the crossing could be seen about 900 feet away.

Exactly on what ground the trial court gave the peremptory does not appear. It is argued that Stanfield's testimony does not show that the two horses which he saw killed were the horses belonging to appellants. It is also claimed that, while this witness was testifying, great beads of perspiration stood on his fore-

head, and that his manner and demeanor on the stand were such as to lead the trial judge to believe that if he ever saw any horses killed they were not the horses owned by appellants. No rule of law is better settled than that, in a common law action, tried by a jury, the credibility of a witness is for the jury. That being true, neither the trial judge nor this court has a right to reject the evidence of a witness merely because his demeanor on the stand is such as to induce the belief that he is not telling the truth. The jury being the sole judges of the credibility of a witness, it is for them to observe his demeanor and determine what credence shall be placed on his statements. Nor do we think that the testimony of the witness in question should be rejected because he did not accurately fix the day on which he claims he saw two horses killed. He says that the occurrence took place on Saturday morning between two and three o'clock at the Campbell crossing during the month of September, 1911. Though he did not identify any particular date, yet, if he saw any horses killed at all, it is by no means probable that other and different horses were killed on a Saturday morning in September at about the same hour and at the same crossing. At any rate, we think the question whether or not the horses which he saw killed were the horses of appellants was for the jury. We therefore conclude that the trial court erred to the prejudice of appellants in peremptorily instructing the jury to find for the defendant.

Judgments reversed and causes remanded for proceedings consistent with this opinion.

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### **Barry v. Town of New Haven, et al.**

(Decided January 8, 1915.)

#### **Appeal from Nelson Circuit Court.**

1. **Municipal Corporations—City of Sixth Class—Indebtedness—Election to Incur.**—In order for a municipality of the sixth class to incur an indebtedness for a public lighting system under a vote of the people, notice of an election for that purpose must be given as required by Section 3705 of the Kentucky Statutes, stating the purpose of the election, the amount of money necessary to be raised annually by taxation for an interest and sinking fund to pay the proposed indebtedness.

2. **Municipal Corporations—Creation of Indebtedness.—Notice of Election.**—A notice of an election under Section 3705 of the Kentucky Statutes by a municipality of the sixth class to incur an indebtedness for a public lighting system, which states the amount of the indebtedness proposed to be incurred, the purpose of the same, and which specifies "the amount necessary to be raised annually by taxation for sinking fund will be \$400.00, and the amount of money necessary to be raised annually for interest will be \$225.00 for the first year, and \$20 less each subsequent year," is sufficiently specific to satisfy the statute.
3. **Municipal Corporations—Election Upon Bond Issue—Validity of Election.**—Where four or five legal voters voted in a general election for United States Senator and other officers, and left the voting place, and afterwards returned to the voting place and voted in an election upon a proposed bond issue by the town, the action upon the part of the voters and the officers of the election was irregular, but did not invalidate the election upon the bond issue.
4. **Municipal Corporations.—Creation of Indebtedness.**—In determining whether or not the proposed indebtedness to be incurred by a municipality for a lighting plant will exceed the constitutional limit of three per cent of the taxable property of the town, the probable cost of maintaining and operating the lighting plant in the future cannot enter into the question; the constitutional prohibition contemplates a present and not a future indebtedness.
5. **Municipal Corporations—Town Trustees—Quorum.**—A majority of a quorum of a board of town trustees is sufficient to take action unless there be some other rule established by the constitution or the charter.
6. **Elections.**—Where the election officers failed to perform their clerical statutory duty of detaching and destroying the unused ballots, but returned them to the clerk, their action constituted a mere irregularity, which did not invalidate the election.

**KELLEY & KELLEY** for appellant.

**R. C. CHERRY** for appellees.

**OPINION OF CHIEF JUSTICE MILLER**—Overruling motion to reinstate injunction.

New Haven, in Nelson county, is a city of the sixth class. An election was held in said town on November 3, 1914, upon the question of authorizing the board of trustees to create an indebtedness of \$4,500.00, and to issue bonds therefor, for the purpose of building a system of electric lights for the town. Sixty-four votes were cast in favor of the bond issue and thirty-two votes were cast against it. It thus received the necessary two-thirds of all the votes cast upon that question, as is required

by Section 157 of the Constitution. On November 14, 1914, the plaintiff, Barry, a citizen and taxpayer of New Haven, brought this action to enjoin the issuing of the proposed bonds upon the following grounds:

(1) The notice of the election did not specify the amount of indebtedness proposed to be incurred, and did not state the amount of money necessary to be raised annually for interest and sinking fund.

(2) The ordinance was illegal and void because it failed to set out particularly, definitely and specifically the amount of indebtedness proposed to be voted; how it was to be paid; the interest the principal was to bear; the kind and character of same; and the question submitted upon the ballot was not sufficiently specific.

(3) The election was void because four or five voters, after having entered the polling place and voted in the regular election for United States Senator and other officers, left the room wherein the election was held, and subsequently returned to said polling place and were given ballots and voted in the town election upon the question of the bond issue.

(4) The notice, ordinance and election were invalid because the amount of the indebtedness proposed, together with the cost of operating and maintaining the lighting system, will exceed three per cent of the total taxable property of the town, the maximum limit authorized and permitted by the Constitution.

(5) The election was void because, when the acts complained of were done, the board of trustees of the town was composed of only four members instead of five, as required by law, and the board was for that reason illegally constituted; and

(6) The election was void because the election officers failed to detach and destroy the unused ballots and return them to the clerk of the county court, attached to the stub of the ballot book, as required by the statute.

The case was tried upon the following agreed statement of facts:

“(1) The exhibits ‘A,’ ‘B’ and ‘C’ referred to and filed with the plaintiff’s petition, herein, are true copies of the Ordinance and the Orders of the Board of Trustees of the Town of New Haven, Ky., ordaining and adopting said ordinance and directing the notice to be given. And there is no further ordinance or order made or entered by said board of trustees concerning the holding of said election involved in this suit.

“(2) That the notice of said election was published in two weekly issues of the New Haven Echo, a weekly newspaper published in New Haven, Nelson county, Ky., and that the notice as published is contained in copies of said papers issued Oct. 1 and 15th, 1914, which are filed in this suit, and the ordinance published in one of said issues as shown by exhibit.

“(3) That the ballot used in voting at said election is filed with the plaintiff's petition in this suit and is marked 'Educational Ballot,' and said exhibit is a *fac simile* of the ballot used at said election, except that it is marked 'Education Ballot.'

“(4) That the exhibit filed with the plaintiff's petition, marked 'Canvassing Board' for identification, is a true copy of the certificate issued and signed by the Board of Election Commissioners of Nelson County, Ky.

“(5) During the holding of said election four or five persons who were legally qualified to vote in New Haven, Nelson county, Ky., for State and county officers and also in said municipal election, and who were not election officers, entered the said polling place where said election was being held and were given a ballot by the said election officers to vote in the State and county election, and, after having cast their said ballots in the regular State and county election, and after same had been deposited in the ballot box, they left said polling place without having voted in said municipal election, and afterwards returned during the voting hours and re-entered said polling place and were given a ballot to vote in said municipal election on the question of creating said indebtedness, which ballot was cast by said voters and accepted by the officers of said election and deposited in said ballot box with the other ballots cast on said question and counted by the election officers and included in and were a part of the total of 96 votes cast on said question.

“(6) It is further agreed that the taxable value of the property in New Haven is as set out and stated in the petition.

“(7) At the time of the adoption of the ordinance respecting said election by the board of trustees of the town of New Haven said board contained only four members, who constituted the said board, the vacancy in said board having been occasioned by the prior resignation of one of its members.

“(8) The unused ballots at said election were not detached from the book of ballots used at said election or destroyed by the election officers, but all of the unused ballots were returned by said election officers to the clerk of the Nelson County Court. The stub book shows that 97 ballots were taken out and the return of the election officers duly certified by them shows that 96 were voted and one was not voted, and all the other ballots remain in the book. The ballot taken out of the book but not voted was returned by the officers of the election as a spoiled ballot.”

The clerk of the circuit court granted an injunction in accordance with the prayer of the petition, and the circuit judge having dissolved said injunction, the plaintiff has applied for a re-instatement thereof. On account of the importance of the questions presented, it was brought before one of the divisions of the court in order that the ruling might have the approval of a majority of the judges of this court.

We will consider, briefly, the objections as above stated, the first and second objections being considered together.

(1) Section 3705 of the Kentucky Statutes, which is a part of the charter of cities of the sixth class, in so far as it concerns the question before us, reads as follows:

“If at any time the board of trustees shall deem it necessary to incur any indebtedness, the payment of which cannot be met by the levy authorized by law, they shall give notice of an election, by the qualified electors of the town, to be held to determine whether such indebtedness proposed to be incurred, the purpose or purposes of the same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund, as herein provided. Such notice shall be published for at least two weeks in some newspaper published in, or of general circulation in, such town, or by posting written or printed notices at three or more public places in such town. If, upon a canvass of the votes cast at such election, it appears that two-thirds of all the qualified electors in such town shall have voted in favor of incurring such indebtedness, it shall be the duty of the board of trustees to pass an ordinance providing for the mode of creating such indebtedness and of paying the same.”

An inspection of the notice of the election shows that it accurately followed the requirements of the statute. It stated the amount of the indebtedness proposed to be incurred; the purpose of the same; the amount of money necessary to be raised annually for interest and sinking fund; and it specifically says that the "amount necessary to be raised annually by taxation for a sinking fund will be \$400.00, and the amount of money necessary to be raised annually for interest will be \$225.00 for the first year and \$20 less each subsequent year." The notice was published in two issues of the New Haven Echo, a weekly newspaper published in New Haven and of general circulation.

Upon this point it is sufficient to say that the requirements of the statute have been carefully followed almost to the letter. All the formal preliminaries leading up to the election were strictly and in good faith pursued. City of Covington, *ex parte*, 160 Ky., 146, relied on by the plaintiff, is not controlling. Covington is a city of the second class, and its charter required the ordinance to state the amount of money necessary to be raised annually by taxation for interest and sinking fund. In the Covington case, however, the ordinance did not comply with the statute in this particular. But in the case at bar the statute requires that the amount of money necessary to be raised annually by taxation must be set out in the notice, and, as we have shown, the notice fully satisfied the statute.

In *Kash v. City of Jackson*, 159 Ky., 523, the notice was defective because it did not specify the amount of interest and sinking fund to be raised each year. But the ordinance in that case did set out those facts; and it was contended that the ordinance cured the defective notice. The court overruled that contention and held that the notice must so provide, because the statute expressly so held. See also *Igleheart v. City of Dawson Springs*, 143 Ky., 140.

When the notice of election is given in the form required by the statute, and the requisite majority has approved the creation of the indebtedness, the board of trustees may then pass an ordinance providing for the mode of creating the indebtedness and levy a tax to pay the annual interest and raise a sinking fund to meet the debt at its maturity. The indebtedness is not created until the city, by means of an election, has obtained the

assent of two-thirds of its qualified voters voting on the question, and issued the bonds evidencing the debt. The tax required to pay the interest and raise the sinking fund may be levied at any time before the bonds are issued and sold. *O'Brien v. City of Owensboro*, 113 Ky., 680; *Fowler v. City of Oakdale*, 158 Ky., 610.

(3) It is next insisted that the election was invalid because four or five voters, after they had voted in the election for United States Senator and other officers, and had left the voting place, returned to the voting place and were permitted to vote in the election upon the bond issue. It is conceded that these voters were legal voters in the town, and had a right to vote on that question; but the complaint is that they should have voted in both elections upon their first entrance into the voting place, and that after having voted in one election and departed they could not return and subsequently vote in the other election. While this practice is irregular, it is by no means fatal. The voting on the bond issue was by a separate ballot which was deposited in a ballot box used for that purpose only; and it being conceded that the voters had the right to vote in the bond issue election, it is difficult to see how the irregularity vitiated the election. Furthermore, it in no way appears how any of these four or five voters voted, or that the result of the election would be changed by excluding their votes. To declare the election void on this account would be to overthrow the verdict of the voters, fairly, accurately and truthfully expressed in the result. When it is once admitted that no person voted at said election who did not have the legal right to vote, and that the election is free from fraud or bad faith on the part of anyone; that the result fairly expresses the will of the majority, the courts ignore any mere irregularity in the method of establishing that result.

In *City of Cynthiana v. Board of Education*, 21 Ky. L. R., 731, 52 S. W., 969, the court said:

"The rule is that where there has been a fair and free expression of the popular will, a mere irregularity in conducting an election will not invalidate it. (7 *Lawson's Rights, &c.*, Section 3798; *Trustees District 88 v. Garvey*, 80 Ky., 159; *Clark v. Leathers*, 9 Ky. Law Rep., 558.)"

See also *McCreary on Elections*, Sec. 126; and *Anderson v. Winfree*, 85 Ky., 610.



In *Trustees Common School District No. 88 v. Garvey*, 80 Ky., 163, it is said:

"The statute, however, should be construed with a view of carrying into execution the legislative will; and when an election has been held and the tax imposed, the burden is on the taxpayer who resists its collection to show that the election is void. A mere irregularity in conducting it will not authorize the chancellor to interfere and prevent the imposition of a burden the taxpayer has assumed for the purpose of aiding a great public interest."

And in *Cowan v. Prowse*, 93 Ky., 156, this court laid down the general principle that a mere irregularity on the part of officers of an election, or their omission to observe some directory provision of the law would not vitiate the poll. See also *Anderson v. Likens*, 104 Ky., 699; *Napier v. Cornett*, 24 Ky. L. R., 576, 68 S. W., 1076; Cooley's "Constitutional Limitations," 7th Ed., pp. 928-930.

(4) Little attention need be paid to the fourth objection, that the indebtedness, together with the cost of operating and maintaining the lighting system, will exceed three per cent of the taxable property of the town, as limited by the Constitution, because said objection is not sustained by any proof. On the contrary, the petition, which, under the stipulation is to be taken as true in this respect, shows the taxable property of the town is \$291,854.00, three per cent thereof being \$8,755.62, or nearly twice the amount of the proposed indebtedness. The probable cost of maintaining and operating the plant in the future cannot enter into the question. The constitutional prohibition contemplates a present and not a future indebtedness.

(5) The board of trustees, as constituted by statute, consisted of five members; but at the time it called the election it consisted of only four members. All four members were present, however, and voted in favor of all the steps that were taken. They constituted a legal quorum, and the fact that one member had resigned in nowise affected the legality of the action taken. A majority of a quorum is sufficient unless there be some other rule established by the Constitution or the charter. Cooley's "Constitutional Limitations," 7th Ed., p. 201.

Section 3697 of the Kentucky Statutes, being a part of the charter of sixth class cities, expressly provides

that a majority of the members of the board of trustees shall constitute a quorum for the transaction of business.

In *Shugars v. Hamilton*, 29 Ky. L. R., 127, 92 S. W., 564, and under a precisely similar provision of the charter of cities of the fifth class, it was held that four members of a council of six members constituted a quorum for the transaction of business.

It follows that the four members in the case at bar were fully authorized to exercise, as they did, the power of the board.

(6) The objection that the election officers failed to perform their clerical statutory duty of detaching and destroying the unused ballots, but returned them to the clerk, is without merit. At most it was a mere irregularity which would not invalidate the election. See authorities cited *supra*. *Graham v. Graham*, 24 Ky. L. R., 548, 68 S. W., 1093, is, in effect, conclusive against this objection. In that case the polls were open about an hour later and closed about an hour earlier than the law required; the ballot box in which the ballots were deposited during the voting hours remained unlocked, and the number of unused ballots was not certified at all. In the absence of evidence showing that someone had been prejudiced by these irregular actions of the election officers, the court declined to nullify the election.

After a careful review of the facts of this case, and all the objections taken to the election, we are of opinion that all the necessary steps were taken to authorize the contemplated bond issue, and that the circuit judge properly dissolved the injunction.

The motion to reinstate the injunction is overruled. Judges Settle, Hannah and Hurt concur in this opinion; and by order of the court this opinion will be printed in the Official Reports.

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### Case v. Steel Coal Company.

(Decided January 8, 1915.)

#### Appeal from Pike Circuit Court.

1. Libel and Slander—Libel by Servant—When Master Not Liable for.—In an action for damages brought by one of its employes against a corporation for a libel affecting him, written and published by the corporation's book-

keeper, a peremptory instruction directing a verdict for the defendant was properly given, where it was conclusively shown by the evidence that the bookkeeper was not at the time acting in the execution of any authority, express or implied, given him by the corporation, and the act was not within the apparent scope of his employment, or in the furtherance of its business, and was never ratified by the corporation.

2. Master and Servant—When Act of Servant Will or Will Not Be Binding Upon the Master.—The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead, for him. If the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by his master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master, as if it were his own. But where the servant steps aside from his employment assuming to act, and does act, solely on his own account in a matter which the master has no more connection with than if he were a complete stranger, it would not be logical or fair to make the master suffer for it, for in doing that act the servant, so called, was absolutely his own master.

E. J. PICKELSIMER and ROSCOE VANOVER for appellant.

STRATTON & STEPHENSON for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment of the Pike Circuit Court entered upon a verdict returned in behalf of appellee in obedience to a peremptory instruction from the court. The action was brought by appellant to recover of appellee damages for the alleged false and malicious publication by its agent of a libel against and concerning him. The language and character of the libel will more fully appear from the following averments of the petition:

“Plaintiff states that on and prior to February 16, 1913, he was employed by the defendant and in its service, engaged in mining coal at its mine in Pike county.

\* \* \* That it was customary for defendant company to issue to its laborers statements showing the amount of labor performed by the laborer for the two weeks preceding, and said statement also showed any and all advances made said laborer for said period.

\* \* \* That on said date defendant, by its duly authorized bookkeeper, issued a statement to this plaintiff showing the amount due said plaintiff from defend-

ant and also, under the head of advances, or under the head showing what defendant had paid plaintiff, defendant wrongfully, unlawfully, willfully and maliciously, and for the purpose of defaming plaintiff in his good name and character, and with malice toward plaintiff, falsely issued said statement with the following item as advanced plaintiff, to-wit: 'Mulage, \$1.50.' That the said bookkeeper of defendant issuing said statement for defendant had the authority under his said employment to issue statements for defendant and was acting in the scope of his authority under his employment by defendant when he issued said statement as above set out. That said statement was exhibited to sundry people and citizens of Pike county, Kentucky, by defendant's said bookkeeper. That by the word 'Mulage' as charged in said statement defendant meant to convey, and those who saw said statement understood defendant to convey, the meaning that plaintiff had been having sexual intercourse with defendant's mules used by defendant in its said coal mine in the mining and operating its said coal mines. That at and previous to said time defendant had been and was using mules in its said mining operations in its said mines; that it was known and generally understood among the miners and people in and about said mines that the word 'Mulage,' as used on said statement, meant to have sexual intercourse with a mule, and that when so charged as an advancement on said statement it meant that defendant company was charging plaintiff the sum of \$1.50 for having sexual intercourse with its mules; that defendant's said bookkeeper, having the authority to issue statements for defendant, showed and exhibited said statement to various and sundry people and at said time laughed and made fun of plaintiff, and thereby and as herein set out, injured and defamed the good name and character of said plaintiff, falsely and maliciously. to his damage in the sum of \$3,000.00."

Appellee's answer, as amended, contained two paragraphs, the first being a traverse and the second alleging, in substance, that, although it did, on February 16, 1913, issue to the appellant a statement showing what was due him for his labor and also such charges as he was owing it, the statement as delivered to appellant contained no charge for "mulage," as alleged in the petition, but that, after the statement was issued and

delivered to appellant, someone then present in appellee's store suggested, as a joke, that appellant should be charged with "mulage," whereupon the latter returned the statement to its bookkeeper, who, to carry out the jest, added to it the word "mulage," and placed opposite same the figures "\$1.50;" that the whole matter was a joke at which appellant took no offense and in which he participated by returning the statement to the bookkeeper for the purpose of having the words and figures in question added to it; and that no charge was in fact made against appellant or deducted from his wages for any such item.

On the trial appellee, at the conclusion of appellant's evidence, moved the court to grant a peremptory instruction directing a verdict for it. The court, however, then declined to act upon the motion, but later granted it at the conclusion of all the evidence.

It is insisted for appellant that the giving of the peremptory instruction was error. If the word "mulage" and accompanying figures complained of had been written and published by appellee's bookkeeper, Johnson in the manner alleged in the petition, its libelous character, in view of the evidence as to the meaning given the word "mulage" by the miners of the community in which appellee's mine is situated, would be manifest, because, as applied, it tended not only to make appellant contemptible and odious, which would of itself make the tort complete, but it in fact charged him with the crime of buggery. So, if the libel had been committed in the manner and under the circumstances indicated, there would seem to be no doubt of the appellant's right to make the bookkeeper, Johnson, responsible therefor in damages; but it would not follow that appellee would be responsible for the act of Johnson in writing or publishing the libel, unless it was done in execution of the authority, express or implied, given by it; for beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master.

It does not appear from the evidence, however, that the alleged libel was committed in the manner alleged in the petition. It was admitted by appellant in giving his testimony, that the statement of his account with

appellee, when first handed him by the bookkeeper, Johnson, did not contain the word "mulage" or the figures \$1.50, but that they were added thereto by Johnson after its delivery to appellant; and apparent from the testimony of Johnson, uncontradicted by appellant, and in part corroborated by the witnesses Cline and Steele, that the addition of the objectionable word and figures was suggested by Cline or Steele asking Johnson if in making out the statement for appellant he had charged him with mulage; in reply to which Johnson said he had not, and then obtained from appellant the statement and added to it the word "mulage" and figures "\$1.50." According to all the evidence, this act of Johnson's raised a laugh among the persons present, in which appellant joined. It is true that appellant claims he became indignant on account of the addition to the statement of the word and figures complained of, but we think it manifest, from the testimony of Johnson, Cline and Steele, that such indignation was not shown by appellant at the time, and he did not deny that he laughed with the others at what all evidently regarded as the joke perpetrated by Johnson.

It is further apparent from the evidence that of the persons present in the store only Cline saw the word "mulage" and figures "\$1.50" after they had been added to the statement by Johnson. They were afterwards seen by two other persons, but it was because the paper was shown them by appellant in the effort to discount or sell it to them, superinduced by his need of the money it showed him entitled to receive, which did not become due until several days later.

The circumstances attending the transaction in question clearly indicates that Johnson's motive in adding to the statement of the word and figures complained of, was to afford amusement to himself and the other persons present. The joke, however, was an indecent one, which only the vulgar mind would appreciate. Although appellant, at the time of its perpetration, was apparently amused by it, he did not willingly participate in the joke, and it can readily be understood that a sober second thought enabled him to realize its sting and the humiliation of feeling that would naturally result to a victim of such obscenity. If this were an action against Johnson for the libel complained of, we would be inclined to hold that he could not escape liability upon the

ground that the libel was a joke. At most, evidence that this was so would be competent only in mitigation of damages, as it would tend to show the motive for the libel and the absence of actual malice.

The remaining question to be determined is, do the facts appearing in the record make appellee responsible for the libel complained of? The paper on which it was written is a printed form appellee requires its bookkeepers to use in furnishing its employees statements of its accounts with them. The statement furnished appellant by Johnson, the bookkeeper, was as follows:

"No. 4.

Feb. 16, 1913.

Mr. Did Case	
Earnings	
Cars, 37 @	22.20
Hours	
Tons	
Yards	
Total Earnings	
Advances	
Store	7.85
Rent	
Doctor	.50
Fuel	
Board	
Smithing	.50
Insurance	
Co. Deductions	
Claims—Mulage	\$1.50
(pencil line run through the word "Claims"	
and on the same line following the word	
"Claims" is the word "Mulage" written	
with pencil.)	
Helpers	3.30
Total Advances	12.15
Balance Due	10.05"

It appears from the foregoing statement that appellee's indebtedness to appellant was \$22.20 and that there was due it from appellant for advances, as shown opposite the proper headings, various items aggregat-

ing \$12.15, which, deducted from the \$22.20 of its indebtedness to appellant, left due him \$10.05, as shown on the statement. According to the evidence, after this statement had been completed Johnson obtained it from appellant and wrote thereon, opposite the word "claims," the word "mulage" and to the right of that word the figures "\$1.50." At the time this was done he ran his pencil through the word "claims." All the figures appearing upon the statement were entered with a pen and ink except the figures "\$1.50," which, together with the word "mulage," was written with a pencil. It will further be observed that the figures "1.50" were not included in the advances charged to appellant in the statement, nor was the \$1.50 actually charged to appellant or deducted from what was due him from appellee. The form of statement used in furnishing appellant his account contains no item or heading for such a charge as muleage, and it is admitted by appellant that no such charge as mulage is required by appellee to be made against its employees.

We think it patent from the evidence that the bookkeeper, Johnson, in writing the word and figures complained of on the statement furnished appellant, was not acting in the performance of any duty required of him by appellee or in the execution of any authority, express or implied, given him by it; nor was it an act within the scope of his employment or in the furtherance of his employer's business. It was merely an act done to accomplish a purpose of his own, wholly foreign to any duty he owed his employer and entirely beyond the apparent scope of his employment by the latter. Nor does it appear from the evidence that his act in writing on the statement the word and figures complained of was at any time approved or ratified by appellee. Many cases have arisen in which the master has been held responsible for the torts of the servant, whether the tort consisted in the infliction of physical injury to the person aggrieved or injury to his character, but in all such cases liability is fastened upon the master because the servant is acting for the master. This doctrine is well stated in *Sullivan v. L. & N. R. R. Co.*, 115 Ky., 447, as follows:

"The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead for him. Obviously, if the



servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by his master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of authority to support it. But where the servant steps aside from his employment and, assuming to act, and does act, solely on his own account in a matter which the master has no more connection with than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it, for in doing that act the servant, so called, was absolutely his own master. \* \* \* In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service and pursuing his own end exclusively, the master is not responsible. If the servant was at the time the injury was inflicted acting for himself and as his own master *pro tempore*, the master is not liable. If the servant stepped aside from his master's business, for however short a time, to do an act connected with his business, the relation of master and servant is for the time suspended." *C. N. O. & T. P. Ry. Co. v. Rue*, 142 Ky., 694.

In *Newell on Slander and Libel*, page 373, it is said:

"If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner. And so, if an agent or servant of the firm defames anyone by the express direction of the firm, or in accordance with the general orders given him by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited, or encouraged any other person to do it; or, if having authority to forbid it, he permitted it, the act was his." *Burgess & Co. v. Patterson*, 32 R., 624.

In *Pennsylvania Iron Works v. Voght Machine Co.*, 139 Ky., 497, it was held that one corporation may sue another for libel on it, as distinct from a libel on its individual members. In that case the plaintiff and defendant were rival ice machine manufacturers, both endeavoring

to secure a particular contract, and defendant's agent, for this purpose, wrote a letter to the proposed purchaser stating that plaintiff was a second-hand dealer, that it put in a class of inferior work, was a scab establishment, and did not have a mechanic in its employ. It was held that such a writing was libelous *per se* and that the corporation whose agent wrote the letter was liable in damages for the libel it contained, because, after obtaining knowledge of the publication of the libel, its failure to repudiate it before suit operated as a ratification and approval of the libel. In the opinion it is said:

"A corporation is liable in damages for the publication of a libel as it is for other torts. To establish its liability the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment in the course of the business in which he was employed. \* \* \*"

In *Duquesne Distributing Co. v. Greenbaum*, 135 Ky., 183, which was an action for slander, it was held that a partnership or corporation is not liable for slander by its servant, unless the actionable words were spoken by its express consent, direction or authority, or were ratified or approved by it. In a case for libel by the servant of a corporation, however, the question of the latter's liability will not turn upon whether it expressly consented to, directed or authorized the libel. It will be responsible for the libel if it was published by the servant in execution of the authority, express or implied, given by the corporation, or in the performance of the service for which the servant was engaged, or the act was one within the apparent scope of his employment. Measured by the above test, there is no cause for holding that appellee is responsible for the libel complained of in this case, hence the action of the circuit court in peremptorily instructing the jury to find for appellee was not error.

Judgment affirmed.

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### **Adams, etc. v. Commonwealth.**

(Decided January 8, 1915.)

Appeal from Rockcastle Circuit Court.

1. **Nuisance—Adulterous Relation—Acts Proving Existence of—How Shown.—Where, with the knowledge generally of other people of**

the neighborhood, a man and woman not legally sustaining to each other the relation of husband and wife, and conclusively shown to be of bad reputation for chastity, together occupied the same house for seven months, and, according to the evidence, acted at times in such a lewd and vulgar manner as to indicate that they were living in adultery, such conduct constituted a common or public nuisance in the meaning of the law.

2. **Nuisance—What Will Constitute.**—A nuisance per se is any act, or omission or use of property or thing, which is of itself hurtful to the health, tranquillity or morals, or outrages the decency of the community. Open and gross lewdness, or whatever openly outrages decency and is injurious to public morals is a misdemeanor and indictable at common law. Thus the living together of a man and woman unmarried, which is generally known throughout the neighborhood, is sufficient to constitute open and notorious lewdness, without proving it to have been in a street or under the immediate observation of strangers. In such case outward indecency is not a necessary element.

C. C. WILLIAMS for appellants.

JAMES GARNETT, Attorney General for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellants, Jennie Adams and John Baker, were jointly indicted in the court below for creating and maintaining a common public nuisance. They were jointly tried and by the verdict of the jury both were found guilty and their punishment fixed at a fine of \$100.00 each. They were refused a new trial and have appealed from the judgment entered upon the verdict.

Their first complaint is that the indictment is fatally defective because it fails to charge that the acts constituting the alleged nuisance were “openly, notoriously and scandalously” committed. It is true that the words quoted do not appear in the indictment, but the acts constituting the nuisance are specifically set out in the indictment; it being in substance alleged therein that appellants, though not husband and wife, did for several months and within a year before the finding of the indictment unlawfully cohabit and live together in adulterous relations in a certain house in the town of Mt. Vernon by sleeping in and occupying the same room and bed in the house and “acting in a lewd and vulgar manner, to the common public nuisance and scandal; and to the detriment of good morals and religion and to those persons then and there residing in the neighborhood

and passing and repassing, and having a right to pass and reside" therein. Obviously the language of the indictment charges a public offense "in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case." If the acts alleged as constituting the offense were committed by appellants as charged and with the knowledge of the persons "residing in the neighborhood and passing, repassing and having a right to pass and reside" therein, as further alleged, they must have been "openly" and "notoriously" committed, and that such was their character is as fully stated as if the words openly and notoriously had been used. We concur in the conclusion of the trial court as to the sufficiency of the indictment; therefore, the demurrer thereto was properly overruled.

The evidence introduced for the Commonwealth manifests the following facts: That the appellant, Jennie Adams, is a widow who owns and occupies a residence in Mt. Vernon, and that at such times as the school of the town was in session some of her nieces lived with her; that the appellant, John Baker, is a married man who does not live with his wife or children; and that for seven or eight months before the finding of the indictment, he was seen at and in the home of Jennie Adams almost continuously, both day and night, his presence there being noticed by persons in the neighborhood late at night and at times early in the morning. He was frequently seen by one of the residents of the neighborhood to come out of Mrs. Adams' house early in the morning without his coat, bare-headed and with his hair uncombed, as though he had just gotten up; and, on one of these occasions, he went directly to the water closet, where he was shortly followed by Mrs. Adams, who went into the closet while he was there and remained with him for some time. On another occasion they were seen in her bedroom together at eleven o'clock at night, the upper part of Baker's body appearing at the time to be naked, and while thus together the light in the room was put out. According to all the evidence of the Commonwealth they lived together as man and wife and were seen on the premises and in the streets together. On yet another occasion a woman of the neighborhood saw

the appellants embrace each other while driving in a buggy on a highway. There were numerous other houses near that of appellant Adams, occupied by men, women and children, all of whom constantly saw the appellants, observed that they lived together as if they were husband and wife, and were greatly annoyed and outraged by their conduct and the relations maintained by them. In addition, it was proved by the Commonwealth that the reputation of each of the appellants for chastity and morality was bad.

On the other hand, the appellants each denied that there were illicit or improper relations between them; denied that they had embraced on the highway or been in the water closet together; or together at night in her bedroom, or at a time when the light was put out. The appellant Baker further denied that he was ever in a room at Mrs. Adams' house with his shirt off, but admitted that he sometimes had his top shirt off at her house. In attempted explanation of their intimacy and the conduct complained of by the residents of the neighborhood, appellants testified that Baker was employed to work for Mrs. Adams, which compelled him to spend much of his time at her house and about the premises, and that he did not sleep or spend the nights at her house. Other witnesses testified that Baker was often at work for Mrs. Adams; that he did some inside painting in the house; made for her a wagon bed and also gathered for her a crop of corn.

While the evidence fails to show any specific adulterous act between appellants or act of gross immorality or indecency, it did as a whole show the presence of the conditions that manifestly attend the existence of the adulterous relations charged in the indictment. In other words, persons so lacking in virtue as appellants are shown by the evidence to be, would not sustain toward each other the relations maintained by them for other than illicit or immoral purposes. As well argued by the Attorney General, the fact that a man and woman who are not married live together in a community and occupy the same house together, under the conditions shown by the evidence in this case, was enough to convince the jury of their guilt of the offense charged, without proof of outward indecency. The relations maintained by appellants could but offend the moral sense of the decent people to whom they were known. For these reasons the

acts and conduct of which they were shown to be guilty constituted such a public or common nuisance as they are charged by the indictment with maintaining. In Roberson's Criminal Law, Vol. 2, page 830, it is said:

"Open and gross lewdness, or whatever openly outrages decency and is injurious to public morals is a misdemeanor and indictable at common law. Thus the living together of a man and woman unmarried, which is generally known throughout the neighborhood, is sufficient to constitute open and notorious lewdness, without proving it to have been in a street or under the immediate observation of strangers."

In Bishop on Criminal Law, Vol. 1, Section 1087, in discussing bawdy houses as a nuisance, the author says:

"Outward indecency is not a necessary element. The allurements are as effective, or even more so, though no indecency or disorder is discernible from without."

In Ehrlich v. Commonwealth, 125 Ky., 746, we said:

"A nuisance *per se* is any act, or omission or use of property or thing, which is of itself hurtful to the health, tranquility or morals, or outrages the decency of the community. It is not permissible or excusable under any circumstances."

There is no ground for appellant's contention that the court should have peremptorily directed a verdict for them, or that the verdict is contrary to the evidence. The case was properly submitted to the jury under instructions which correctly advised them of the law, and as there was evidence to support the verdict, it will not be disturbed.

Judgment affirmed.

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### **Rist v. Commonwealth.**

**Same v. Same.**

**Same v. Same.**

**Same v. Same.**

(Decided January 12, 1915.)

### **Appeals from Lawrence Circuit Court.**

1. **Intoxicating Liquors—Procurement Where Liquor May be Sold.**—In prosecutions for violation of the local option law it is neces-

sary, in order to make the sale unlawful, that the purchase shall be made in local option territory; the act does not apply to the purchase or procurement of intoxicating liquors in territory where they may be lawfully purchased or procured.

2. **Intoxicating Liquors—Local Option Law—Place of Sale.**—Where an order for whiskey, accompanied by the purchase price, is received by the seller in a county where intoxicating liquors may lawfully be sold, and, pursuant to said order, the whiskey is delivered to a common carrier, consigned to the purchaser in a local option county, the sale takes place in the county in which the order is received, and is not a violation of the local option law.

D. M. HOWERTON and GEORGE B. MARTIN for appellant.

JAMES GARNETT, Attorney General, and O. S. HOGAN, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Reversing in each case.

The appellant, John F. Rist, was indicted four times in the Lawrence Circuit Court for selling intoxicating liquors in local option territory. The four cases involve identical questions of law and will be disposed of in one opinion. In three of the cases the prosecuting witness sent by mail from Louisa, where the local option law is in force, a letter to Rist at Catlettsburg, where the local option law is not in force, ordering whisky, and enclosing therewith money, or a money order, to pay for the whisky. In the other case the prosecuting witness sent the letter and money from Torchlight, in which the local option law is in force, to Rist at Catlettsburg.

In each instance Rist received the letter and money at Catlettsburg; and, in accordance with the order, delivered the whisky to the Adams Express Company at Catlettsburg, consigned in three instances to the purchaser at his address in Louisa, and in the other instance to the purchaser in Torchlight. Upon a trial under these facts, Rist was fined \$80.00 in one case; \$100.00 in the second case; \$100.00 and punished with confinement in jail for forty days in the third case; and a fine of \$100.00 and ten days in jail in the fourth case. From those judgments these appeals are prosecuted.

Rist was a licensed liquor dealer in Catlettsburg, in which, as above stated, the local option law was not in force. It has been repeatedly held in prosecutions of this character that in order to make the sale unlawful the purchase must be made in local option territory.

The statute does not apply to the purchase or procurement of intoxicating liquors in territory where they may be lawfully purchased or procured; and, in applying the statute to the facts in cases precisely like the case at bar, it has repeatedly been held that when an order for whisky, accompanied by the purchase price, is received by the seller in a place where intoxicating liquors may lawfully be sold, and, pursuant to such order, the whisky is delivered to a common carrier at the place of the seller's residence, consigned to the purchaser in a local option place, the law regards the sale as taking place in the county or town in which the order is received and the seller's place of business is located.

Under such circumstances the sale is made in "wet" territory and is, consequently, not a violation of the local option law. It was so expressly held in *Geo. Wiedemann Brewing Co. v. Commonwealth*, 123 Ky., 556; *Commonwealth v. Gast*, 143 Ky., 674; *Parker v. Commonwealth*, 147 Ky., 715; *Josselson v. Commonwealth*, 154 Ky., 795; *Josselson Bros. v. Commonwealth*, 158 Ky., 787; *Josselson Bros. v. Commonwealth*, 159 Ky., 468; and *Rist v. Commonwealth*, 159 Ky., 753. By referring to the opinions in the cases above cited it will be seen that the facts upon which the dealer was convicted in those cases were substantially, if not precisely, the same as the facts presented in the cases at bar; and that in each of those cases this court held that the facts did not authorize the conviction of the dealer for the offense there and here charged.

Judgment reversed on each appeal.

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### **California Insurance Company v. Settle.**

(Decided January 12, 1915.)

#### **Appeal from McCracken Circuit Court.**

**Insurance—The Contract—Oral Contract of Fire Insurance—Actions—Sufficiency of Evidence.**—Plaintiff's evidence showed a promise upon the part of a fire insurance agent, made Dec. 15, 1912, to issue a policy of fire insurance on Jan. 1, 1913, to be effective for three years thereafter. Held, no completed contract effected.

**CAMPBELL & CAMPBELL** for appellant.

**EATON & BOYD** for appellee.



**OPINION OF THE COURT BY JUDGE HANNAH—Reversing.**

Mrs. Nellie Settle sued the California Insurance Company in the McCracken Circuit Court upon an alleged oral contract of insurance against loss by fire, and obtained a verdict and judgment in the sum of \$582.00. The insurance company appeals.

Upon the trial the plaintiff testified that her house was destroyed by fire on April 15, 1913; that about the middle of December, 1912, one Julius Friedman, an agent of the California Insurance Company, called upon her at her place of work at the Paris Dry Cleaning Plant, in Paducah; that "he asked about insuring my house; he said he had heard I did not have any insurance on it; said he would like to insure me. I told him I did not have any insurance, and that I would like to have some. He said, 'I will insure you.' He said he had insurance on one of my neighbors' homes; that he had already seen my house, and knew all about it; all he wanted to know was whether I carried insurance. I told him I did not. He said, 'I will write it up. \* \* \* I will insure your property for \$600.00;' that it would be worth that much. I said, 'All right, that is satisfactory to me.' I was to pay him \$18.00 for three years, the time the property was to be insured for. He said if I did not have the money to pay the full premium, he would give me time; he said he would divide it into three different parts; that I could pay six dollars at a time. Q. Was anything said about when the insurance was to commence? A. On the first of the year, on January 1, 1913. He said he would insure me in the company that my neighbors were insured in. I asked what company that was; he said one of the best companies I have, the California Insurance Company."

The agent testified that the only conversation ever had by him with the plaintiff occurred about the middle of October, 1912, and that when he spoke to her on this occasion relative to taking the insurance, she said she was unable to pay the premium, and would wait until December. No policy was issued to Mrs. Settle and nothing further was ever said between them concerning the matter.

1. Appellant contends that the trial court erred in denying its motion for a directed verdict, and urges that the plaintiff failed to show a valid oral contract to insure or to issue a policy of insurance.

It is undoubtedly competent for an authorized agent of a fire insurance company to contract for the issuance of a policy of insurance and to agree that in the interim the property in question shall be insured, where the subject matter, the perils insured against, the amount of the insurance, the duration of the risk, the rate of premium, the identity of the parties and such other matters as may be essential, have all been agreed upon. *Shawnee Fire Insurance Company v. Roll*, 145 Ky., 113, 140 S. W., 49.

And it has also been held that an oral contract made by the authorized agent of a fire insurance company to renew an existing policy of insurance is valid, although made before the expiration of the existing policy. *Baldwin v. Phoenix Insurance Company*, 107 Ky., 356, 21 B., 1090, 54 S. W., 13, 92 A. S. R., 362.

But neither of these cases is applicable to the facts obtaining in the case at bar. Here there was no existing contract to be renewed, nor was there effected a contract of insurance in *praesenti*. In this case, considering only the plaintiff's evidence, and taking it as true upon the motion for a directed verdict, there is shown a promise upon the part of the agent, made about December 15, 1912, to issue a policy of fire insurance on plaintiff's property in the sum of six hundred dollars, on January 1, 1913, the policy to be effective for three years thereafter. The premium was to be eighteen dollars, but no part of it was ever paid, nor was any time agreed upon when it should be paid. The plaintiff's evidence shows, not a contract completed at the time, but a promise to issue a policy at a future date and to effect a completed contract then. This was never done.

To show an oral contract of insurance a definite and certain agreement to insure must be proven. *Fireman's Fund v. Searcy*, 157 Ky., 749, 163 S. W., 1103. No such agreement was shown in this case, and the trial court erred in denying defendant's motion for a directed verdict at the close of plaintiff's evidence.

2. Appellant also contends that plaintiff failed to show authority upon the part of the agent to make the contract sought to be enforced.

Such authority was shown by the agent's own deposition; but appellant insists that the fact of agency and extent of the agent's authority may not be proven in this manner, citing, in support of its contention in this

respect, Elliott on Contracts, Section 2931, and L. & N. v. Byrley, 152 Ky., 35, 153 S. W., 36, in both of which it is said that the admissions or declarations of an agent cannot be given in evidence against the principal, either to establish the fact of agency or the extent of authority. But this rule has reference only to statements made by the agent out of court. His assertions not under oath are rejected; but the agent's testimony is competent to show the fact of agency and extent of his authority. See Chamberlayne on Evidence, Sec. 1339, 31 Cyc., 1652.

For the error in denying defendant's motion for a directed verdict, the judgment is reversed.

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### Wallace v. Commonwealth.

(Decided January 12, 1915.)

#### Appeal from Daviess Circuit Court.

1. **Burglary—Prosecutions—Instructions.**—The instructions upon a prosecution for house breaking must require proof of an asportation.
2. **Burglary—Prosecution—Sufficiency of Evidence.**—Where there is no evidence to show how the entrance was effected or that it was effected, there can be no conviction of the offense of house breaking.

LOUIS I. IGLEHEART for appellant.

JAMES GARNETT, Attorney General, and ROBERT T. CALDWELL, Assistant Attorney General, for appellee.

#### OPINION OF THE COURT BY JUDGE HANNAH—Reversing.

Richard Wallace was convicted under an indictment charging him with the statutory offense of house-breaking.

He appeals, contending that the offense charged in the indictment was not sufficiently proven, and that the court erred in instructing the jury.

1. In instructing the jury the court authorized a conviction without requiring proof of the execution of the felonious intent to steal, by the actual stealing and carrying away of property of value from the dwelling house in question.

It was held in *Drake v. Commonwealth*, 31 B., 1286, 104 S. W., 1000, that the jury must be instructed that before they can convict for house-breaking they must also believe from the evidence beyond a reasonable doubt that the defendant took, stole and carried away the articles or some of the articles designated.

The instruction was erroneous for failure to require proof of an asportation.

2. It is also insisted by appellant that the breaking was not sufficiently proven, and that the trial court erred in denying defendant's motion for a directed verdict, based upon that ground.

The prosecuting witness stated that "the house must have been broken into between Sunday and Wednesday;" that she always closed up the house when she left it; that it was not left open at any time during the week before the discovery of the absence of the missing articles, so far as she knew; and, in answer to the question, "You don't know how the parties entered the house, that got those things, and have no idea about it?" she answered, "None in the world."

In *Little v. Commonwealth*, 151 Ky., 520, a prosecution for house-breaking, there was no evidence whatever to show how the entrance was effected, and, because of this failure of proof, the court reversed a judgment of conviction. Upon the authority of the *Little* case, the defendant in the case at bar was entitled to a directed verdict.

While, under a proper indictment, the defendant might have been convicted of grand or petty larceny, such conviction may not be had upon an indictment charging him with the offense of house-breaking. *Farris v. Commonwealth*, 90 Ky., 637. *Thomas v. Commonwealth*, 150 Ky., 374.

For the errors indicated, the judgment of conviction is reversed.

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### **Combs v. Commonwealth.**

(Decided January 12, 1915.)

Appeal from Perry Circuit Court.

1. Intoxicating Liquors—Local Option.—Under an indictment for having liquor in one's possession for sale in local option territory,

the jury may take into consideration all the circumstances to determine whether the possession was for purpose of sale.

2. **Jurisdiction—Judicial Notice—Location of Cities and Towns.**—The court and jury have the right to take cognizance of the county in which public cities and towns are situated without proof aliunde of that fact.

**NAPIER & TURNER** for appellant.

**JAMES GARNETT**, Attorney General, for appellee.

**OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

The appellant, John S. Combs, is a negro school teacher in Perry county, and his brother, Brit Combs, is a practicing physician, and has a place of business (not named) in Hazard, the county seat of that county. John S. Combs, the appellant, was indicted and fined \$60 for the offense of having whisky in his possession for the purpose of sale in Perry county, a territory where the sale of such liquor is prohibited by law.

We gather from the testimony of the express agent at Hazard and the appellant—the only witnesses in the case—that Brit Combs ordered 12 gallons of whisky to be shipped in the name of his brother, the appellant. The whisky came by express in four packages. There were marks on the packages to show that they contained whisky, and were for the personal use of the consignee. Brit Combs went to the express office and asked permission of Collins, the agent, to take possession of the whisky and sign his brother's name to the receipt. This being refused, his brother, the appellant, went to the office, signed for the whisky and told the express agent, who was also a drayman, to take the whisky to his brother's place of business. The receipt signed by the appellant is an acknowledgment that he knew the contents of the packages, and is a representation that they were for his personal use. The expressman testifies also that in case of whisky shipments it is his custom to inquire of the consignee if it is for personal use, and "I think I asked the defendant that question."

In the face of the label on the packages and the wording of the receipt, and his ability as a school teacher to read, he says that he did not know that the packages contained whisky, nor did he know that his brother Brit had ordered any whisky or other thing in his name.

There were a number of suspicious circumstances connected with the transaction, and all of them were proper subjects for the jury's consideration in determining whether or not the transaction was unlawful. The quantity of whisky in the shipment; the fact that Brit did not order it in his own name; the fact that the appellant, ignorant of the character of it, failed to make any inquiries of his brother, and, without a question or a look, went to the express office, signed the receipt and thereby assumed responsibility for it, are sufficient to raise the question as to whether it was not in fact a subterfuge resorted to by both parties to procure the whisky for unlawful use—just such a trick or artifice as the statute declares shall not be used to evade the liquor laws. The fact that Brit undertook to use his brother's name in this way is evidence to show that his reputation was such that he could not accomplish the purpose in his own name.

When appellant receipted for the whisky he at once directed the express agent how to dispose of it, and the expressman then became his agent to that extent, so that for all practical purposes the liquor did come into appellant's possession. In order to complete this offense it is not necessary that the accused shall actually make a sale. It is sufficient if he has the whisky in his possession with that intent. When the gist of the offense is the intent, then the jury may take into consideration all of the circumstances to determine that fact. From his own testimony the whisky was not for his personal use. In the minds of a jury in local option territory 12 gallons of whisky may be too much for one man to have at a time for his personal use, and is a strong circumstance to prove that it was in his possession for purposes of sale.

In *Peters v. Commonwealth*, 154 Ky., 689, the court used this language:

"It must be remembered, however, that in determining the purpose of the defendant in a case like this, the jury are not confined to his testimony alone, but have the right to take into consideration all of the facts and circumstances surrounding the transaction."

To the same effect is *King v. Commonwealth*, 143 Ky., 127, where the court said:

"It is, however, necessary to sustain a prosecution that the Commonwealth, in a case like the one before us,

should show, first, that the person being prosecuted had in his possession liquors, and, second, that he had it for the purpose of selling it in local option territory. But it is not essential to sustain a conviction that direct evidence of either of these facts should be made by the Commonwealth, and conviction may be had upon circumstantial evidence."

Appellant argues that the Commonwealth failed to prove that the offense was committed within twelve months before the finding of the indictment. We are unable to understand the reason for this argument when the record shows the indictment was returned May 19th, 1914, and the circumstances above referred to occurred on February 13th, 1914.

Appellant insists that the lower court erred in refusing to give a peremptory instruction, because the Commonwealth failed to prove that the offense was committed in Perry county. The testimony shows that the offense was committed in the town of Hazard. The county seat of Perry county is Hazard, where the trial was had.

"The court and jury have the right to take cognizance of public cities and towns within their jurisdiction without proof *aliunde* of the particular county in which they are situated; they are presumed to have knowledge of the fact; for instance, the court and jury are presumed to know that Springfield is the county seat of Washington county, and that it is situated in that county. This presumption is judicial and no proof *aliunde* is required of the fact. The burden, therefore, was on the appellee to show that the offense was committed in some other jurisdiction." Commonwealth v. Patterson, 10 R., 167, 8 S. W., 694; see also Hays v. Commonwealth, 12 R., 611, 14 S. W., 833; Pickerel v. Commonwealth, 17 R., 120, 30 S. W., 617; Combs v. Commonwealth, 15 R., 659, 25 S. W., 592; Warner v. Commonwealth, 27 R., 219, 84 S. W., 742.

The judgment is affirmed.

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### Eads v. Commonwealth.

(Decided January 12, 1915.)

Appeal from Russell Circuit Court.

Criminal Law—Rape—Carnal Knowledge of Female Under 16 Years of Age.—Appellant was indicted for rape and found guilty

of carnally knowing a female under 16 years of age. The offense of which he was found guilty is included in the higher crime, and, therefore, the court properly instructed the jury.

J. N. MEADOWS and LILBURN PHELPS for appellant.

JAMES GARNETT, Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

In October, 1913, the appellant was indicted and charged with the offense of forcibly ravishing and having carnal knowledge of a certain female on the — day of January, 1913, against her will and consent. For a decision of this case it is unnecessary to name the prosecuting witness, or to relate or discuss the incriminating facts disclosed in the evidence.

The appellant was convicted and sentenced to the penitentiary for a term of 10 to 20 years. Judgment was pronounced under the Indeterminate Sentence Law then in force, and found in the Acts of 1910. Uncontradicted testimony shows that appellant did have intercourse with the prosecutrix by force and against her will. And it is also shown, without contradiction, that she was, at the time, an infant under sixteen years of age. The appellant did not testify. For defense his main reliance was a plea of insanity. This defense was submitted to the jury under appropriate instructions. By one instruction the court told the jury that if they believed beyond a reasonable doubt he had sexual intercourse with the prosecutrix, against her will or consent, or by force, they would find him guilty of rape and fix his punishment at confinement in the penitentiary for not less than 10 years nor no more than 20 years, or at death, in their discretion.

By another instruction they were told if they believed from the evidence, beyond a reasonable doubt, that he had sexual intercourse with the prosecutrix, who was then under 16 years of age, without force, or if she was willing to or consented to the intercourse, then they would find him guilty of carnally knowing a female under the age of 16 years, and fix no penalty. By another instruction they were told that if they found him guilty, but had a reasonable doubt as to whether his crime was rape or carnally knowing a female under the age of 16, they would find him guilty of the latter, that being the lesser offense.



The jury found him guilty of carnally knowing a female under the age of 16 years. The court imposed the statutory penalty, as directed in the indeterminate sentence law.

The first error complained of is in giving the instruction on carnally knowing a female under 16 years of age. The argument is that he was indicted for ravishing the female with force, and against her will and consent, and as all the evidence concerning the act showed that the offense was committed with force, then no instruction as to a lesser degree should have been given.

But, as above stated, the evidence also shows that the female was under sixteen.

In *Fenston v. Commonwealth*, 82 Ky., 549, and *Nider v. Commonwealth*, 140 Ky., 684, this court held that having carnal knowledge of a female under sixteen is a lesser degree of the offense of rape, and the lesser offense, for which the appellant was convicted, being included in that charged in the indictment, the court did not err in giving the instruction in question.

Appellant says that the court erred in directing the jury to fix no penalty in the event they found him guilty of the lesser offense. In other words, it is argued, that, as they were told to fix the penalty in the case of rape, the same direction should have been given as to the penalty for the lesser offense.

The instructions, however, in this regard conform to the provisions of the 1910 Indeterminate Sentence law. Under that act, if one is found guilty of a felony, punishable by death, the jury shall fix the punishment. Hence, the instruction on rape named the penalty and told the jury to impose it if they found defendant guilty. In other felonies, where the punishment is less than death or life sentence in the penitentiary, as in the case of a lesser degree of rape, the jury is directed only to ascertain whether or not the person is guilty, and the degree of the offense. In the event of a finding of guilt, the court pronounces the sentence within the limits of the statute, and there is, therefore, no reason why the instruction should name the penalty.

Since the instructions are in harmony with the law in force at the time, the appellant's complaint is not well taken.

Appellant next insists that the verdict is not sustained by the evidence. Only two witnesses testify con-

cerning the acts constituting the offense. They are the prosecutrix and her sister. At the time of the trial the prosecutrix was 16 years of age and the sister about 12. No attempt was made to impeach the character of either, but their testimony was attacked rather vigorously on cross-examination. Their credibility and the weight of their evidence were matters for the jury. In our opinion, their testimony would uphold a conviction for rape, but as the verdict found him guilty of the lesser offense, that is, of having carnal knowledge of a female under 16 years of age, and as there is no room for doubt on the question of intercourse, or the matter of her age, we are unable to see any merit in this contention.

Upon the question of appellant's sanity, or mental responsibility for the crime, there is a sharp conflict in the evidence. Many witnesses are introduced who testify pro and con. This is likewise a question for the jury. It was submitted to them under proper instructions, and there being ample evidence to sustain the verdict, we cannot disturb it.

The judgment is, therefore, affirmed.

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### **Rosenberg v. Dahl.**

(Decided January 12, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Fourth Division).

1. **Animals—Horse Running Away on Street—Presumption of Negligence.**—When a horse that has been left unhitched and unattended on the street of a city runs away, thereby causing injury, the complaining party may rest his case on the prima facie inference of negligence arising from the fact that the horse was left unhitched and unattended, without offering evidence as to the habits or qualities of the horse or the cause that made him run away.
2. **Animals—Horse Running Away on Street—Burden of Proof.—Negligence of Owner Question for Jury.**—The mere fact that an unhitched, unattended horse runs away in the street of a city, does not create a conclusive presumption of negligence; but whenever a horse so left runs off, then the owner takes the burden of showing the disposition and qualities of the horse and that in leaving him unhitched he acted with reasonable prudence, and it is for the jury to say whether he was or was not guilty of negligence.
3. **Evidence—Weight of for Jury—Answers of Witness not Conclusive.**—The jury are not bound to accept as true the direct answers of

a witness to one or more questions, but may, upon the whole of his evidence, disregard his "yes and no" answers, and, upon the facts and circumstances disclosed by his evidence, find a verdict contrary to his express declarations.

4. **Agency—Liability of Principal for Negligence of Agent.**—Where the owner of a horse permits his agent or employe to use him, the owner is liable to a person who is injured by the horse through negligence of the agent or employe.
5. **Damages—Excessive Damages.**—This court is not authorized to grant a new trial merely on the ground that the assessment of damages is excessive, unless they appear to have been awarded under influence of passion or prejudice or are so excessive as to be entirely out of proportion to the injury sustained.
6. **Trial—In Actions for Tort Where Only One of Several Defendants Is Summoned.**—Section 363 of the Civil Code provides that in certain actions the plaintiff can only demand a trial as to part of the defendants upon discontinuing his action as to those not served with process, but the defendant, if he wishes to object to a trial, must make his objection in seasonable time, and if he fails to so object, he cannot thereafter avail himself either in the trial court or in this court of the benefits of the code provision.
7. **Judgment—Error in Form of Not Prejudicial.**—Where "A" and "B" were made defendants but "A" only was served with process and answered, a judgment against "A" and "B" was not prejudicial to the rights of "A," as the judgment as to "B" was void.
8. **Judgment—Surplus Matter.**—Surplus matter in a judgment will not be ground for reversal unless the rights of the real defendant are prejudiced thereby.

M. A. SACHS, D. A. SACHS, J. G. SACHS, BENJ. H. SACHS and D. A. SACHS, JR. for appellant.

J. L. RICHARDSON and LIEBER & HEIDENBERG for appellee.

#### OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellee, Dahl, brought this suit against the appellant, "S. Rosenberg and others, partners doing business under the firm name and style of Royal Milling Company, and George Romiser," to recover damages for personal injuries sustained, as he alleged, when a vehicle in which he was riding in the city of Louisville was collided with by a runaway horse and buggy owned, as he alleged, by "S. Rosenberg and others unknown to this plaintiff, doing business under the firm name and style of Royal Milling Company," and which at the time of the collision was being used by Romiser, their servant and agent.

It appears that the summons issued on the petition was executed on Rosenberg individually and also as pres-

ident and chief officer of the Royal Milling Co., neither Romiser nor any other defendants being served with process.

Rosenberg individually filed his answer, in which, after traversing the averments of the petition, he specifically denied that at the time of the accident "Romiser was a servant, agent or employe of the defendant Rosenberg or of said Rosenberg and others doing business under the firm name or style of Royal Milling Company, or that he ever was an agent, servant or employe of defendant Rosenberg."

In a separate paragraph he set up as a defense the contributory negligence of Dahl.

On a trial of the case before a jury there was a verdict reading: "We, the jury, find for the plaintiff in the sum of \$2,500.00," and on this verdict the following judgment was entered: "It is considered and adjudged by the court that the plaintiff, George Dahl, recover of the defendants, S. Rosenberg, and others, partners, doing business under the firm name and style of Royal Milling Co., and George Romiser, the sum of \$2,500.00, with 6% interest per annum from September 18, 1913, and his costs."

A reversal of this judgment is asked because the evidence failed to show that Romiser, who was in charge of the horse at the time it ran off, was an agent, servant or employe of Rosenberg, and also for other reasons that will be noticed in the progress of the opinion.

The circumstances of the accident are about these: Romiser was driving the horse that ran off to a buggy while he was out soliciting customers for flour. When he went into the store of a man named Ott on Storey avenue, in the city of Louisville, for the purpose of talking to him about the flour he was selling, he left the horse attached to the buggy standing on the street, unhitched and unattended, in front of the store. A little while after Romiser went into the store the horse, for some cause not explained in the evidence, ran away and the front wheel of the buggy collided with the rear wheel of the surrey in which appellee was riding. In the collision, and as a result of it, appellee was thrown out, or partly out, of the surrey, receiving the injuries for which he sought to recover damages.

As the alleged negligence on which the action was founded grew out of the conduct of Romiser, who was in

charge of the horse, it was essential to a recovery against Rosenberg that the appellee should have introduced evidence sufficient to show that Romiser was using the horse in connection with the business of Rosenberg, and while acting as his agent or employe, and it is earnestly contended by counsel for the appellant that the evidence on behalf of appellee did not establish the employment or agency.

Of course, if Romiser, in using the horse and buggy at the time, was acting as the agent of Rosenberg, or in his employment, and his negligence caused the injury to appellee, Rosenberg could be made liable in damages for the negligence of his agent or employe; but if Romiser was not using the horse and buggy as an agent or employe of Rosenberg, then Rosenberg could not be subjected to damages on account of the negligence of Romiser in leaving the horse standing on the street unhitched.

We have read and considered very carefully the evidence of Romiser and Rosenberg, the only witnesses who testify on this subject, and both of them say, in answer to direct questions, that Romiser, on the day the accident happened, was not soliciting orders for or acting as agent or employe either for Rosenberg or the Royal Milling Co., which it appears was the name assumed by Rosenberg in the conduct of his business as a dealer in flour. But when the whole of their evidence is read, it leaves the unmistakable impression that Romiser was in fact using the horse and buggy in soliciting orders for Rosenberg and the Royal Milling Co. The evidence of these witnesses is full of evasion and effort to exonerate Rosenberg from liability for the accident, and the jury having the right to weigh and consider the whole of the evidence and the fair and reasonable inferences that might be drawn therefrom, came to the conclusion that Romiser was an agent of Rosenberg and the Royal Milling Co., and we are not prepared to say that their finding upon this disputed issue of fact is not sustained by sufficient evidence, direct and circumstantial, to support the verdict.

When a witness is examined concerning a transaction the jury are not bound to accept as true his direct answers to one or more questions, but may, upon the whole of his evidence, be entirely justified in disregarding his "yes and no" answers and in reaching the conclusion that

his evidence as a whole is so contradictory to the categorical answers as to furnish reasonable ground for the belief that the real truth of the transaction is to be found in the facts and circumstances that destroy the probative value of his direct and unequivocal answers.

The court told the jury in the instructions that they could not find for appellee unless they believed that at the time of the accident Romiser was acting as the servant, agent or employe of Rosenberg and the Royal Milling Company, and the jury could not have found a verdict for appellee unless they so believed, and our reading of the evidence upon this feature of the case convinces us that the jury did not make any mistake in so finding.

The next question is, did the negligence of Romiser cause the accident? The testimony of Romiser in relating how the accident happened is as follows: "Q. How did you happen to let the horse get away that day? A. He just ran away. I did not let him. Q. You were at Ott's grocery store? A. Yes, sir. Q. You left him unhitched out in front? A. Yes, sir. Q. Left him standing loose in the street? A. Yes, sir. Q. And when you went out to get him he bolted? A. When I went out to get him? Q. Yes. A. No, sir. He bolted before I went out to get him or he would not have knocked me unconscious. Q. How did he happen to hit you? A. The horse was headed out Storey avenue. I was in Mr. Ott's grocery and he says, 'There goes your horse.' The minute I seen the horse running I started out, and I made a break at the lines, and as I grabbed at the lines I missed them and he knocked me unconscious, and that is all I know about him. Q. Did you have a hitching rein on your buggy? A. Yes, sir. Q. Why didn't you hitch him? A. No place there convenient to hitch."

Mr. Ott was asked: "Q. I will ask you where you were standing in your store at the time of this accident? A. Right inside the door. Q. Was Mr. Romiser standing near you? A. Right close by me. Q. Did you see this accident? A. Yes, I seen the horse running away. Q. Tell the jury just what you saw. A. The horse ran away, and Mr. Romiser ran after it, and when he got close to the buggy he must have got caught and throwed Mr. Romiser on the ground. That is all I seen."

This being all the evidence on the subject of the horse running away except that relating to the immediate collision, it is insisted by counsel for appellant that it is

not sufficient to show that Romiser was guilty of any actionable negligence. The evidence we have quoted merely shows that Romiser left the horse unhitched and unattended when he went into the store of Ott, and that the horse, for some unaccountable cause, ran off. There is no evidence as to the nature or habits of the horse or as to whether he was gentle or wild, docile or vicious; so that, unless it will be presumed that Romiser was negligent, or negligence may be inferred from the mere fact that the horse he left unattended and unhitched in the street ran off, there is no evidence of negligence in the record. If, however, this presumption or inference of negligence arises from the facts stated, then it was incumbent upon appellant, if he desired to show that Romiser was not negligent, to overcome this inference by evidence that the horse was gentle and his habits good, and that in the exercise of ordinary care it could not have been anticipated that he would become frightened or run off.

In *Palmer Transfer Co. v. Long*, 140 Ky., 111, we had a case in many respects like this. The driver of a carriage for hire left his horses standing unattended in the street while he went into a house for the purpose of getting a passenger, and they became frightened and ran away, injuring Mrs. Long, an occupant of the carriage, who brought suit for damages. What caused the horses to run away did not appear, but we said:

"We think the jury was authorized to find that the driver was negligent in not keeping hold of the reins, or hitching his horses. Unless he knew that the horses were gentle and would stand without being held, it was his duty to have his hands on the reins so that he could control them, or to have hitched them. There is no evidence that the horses were gentle or safe, and the presumption from their conduct is that they were not."

In *Robert Dennery v. Great Atlantic and Pacific Tea Co.*, 82 N. J. Law, 517, 39 L. R. A. (n. s.), 574, the court said: "If, therefore, a horse and wagon are found passing along a street with no one in charge, the absence of a driver gives rise to prima facie evidence of negligence on the part of the owner. The fact that the horse is running does not negative this presumption. That a horse, under such circumstances, finding itself without any one's guidance or control, should soon commence running is the result both of its nature and of its training. \* \* \*

We think, therefore, that the unexplained presence upon a public highway of a team of runaway horses harnessed to a wagon, unattended by the owner or other person, raises a *prima facie* presumption of negligence on the part of the owner." To the same effect are: *Corona Coal & Iron Co. v. White*, 158 Ala., 627, 20 L. R. A. (n. s.), 958; *Southworth v. Old Colony & Newport Ry Co.*, 105 Mass., 342, 7 Am. St. Rep., 528; *Wasmer v. Delaware, Lackawana & Western R. R. Co.*, 80 N. Y., 212, 36 A. R., 608; *Moulton v. Lewiston B. & B. St. Ry.*, 102 Me., 186, 10 L. R. A. (n. s.), 845; *Ryan v. McIntosh*, 17 A. & E. Ann. Cases, 806.

Many other authorities sustaining the proposition that it is *prima facie* evidence of negligence to leave a horse that runs away unhitched and unattended in a public street of a city might be referred to, but there is really no substantial difference of opinion in the cases upon this subject.

The general rule, and the one that we adopt as correct, is that when a horse, that has been left unhitched and unattended on the street of a city, runs away, thereby causing injury, the complaining party may rest his case on the *prima facie* inference of negligence arising from evidence that the horse was left unhitched and unattended, without offering any evidence as to the habits or qualities of the horse, or the cause that made him run away. We do not mean, however, to say that the mere fact that an unhitched or unattended horse runs away creates a conclusive presumption of negligence, or that the court should so instruct the jury as a matter of law. For, whether or not the owner introduces evidence tending to show the gentle and quiet habits of the horse, or such other pertinent facts as illustrate the exercise of care on his part in leaving him unattended and unhitched—although of course he may do this—or the case is closed without any evidence of the character or habits of the horse or evidence of care on the part of the owner, it is a question for the jury to say whether the owner was negligent in leaving the horse unattended and unhitched.

There are many horses of good habits and gentle disposition that may safely be left on the street unhitched and unattended, but whenever a horse so left runs off, then the owner takes the burden of showing the disposition and qualities of the horse and that in leaving him unhitched he acted with reasonable prudence, and it is



for the jury to say whether he was or was not guilty of negligence. *Dolfinger v. Fishback*, 12 Bush, 474.

This view of the law was presented in an instruction telling the jury that if they believed from the evidence that Romiser carelessly and negligently so managed and controlled or handled the horse attached to the vehicle as to suffer the horse to run away unattended by any one in charge, through the streets of Louisville, whereby he came in contact with the vehicle in which the plaintiff was riding, the law is for the plaintiff and that unless they so believed they should find for the defendant.

Another ground for reversal is that the damages awarded are excessive. The appellee, at the time he was injured, was a delicate man, under the treatment of Dr. Pope, and the evidence of Dr. Pope and the other witnesses tends to show that his condition was much aggravated by the accident, and that he sustained on account of this some permanent injury.

The assessment of damages is, we think, larger than it should be, and yet it cannot be said that it is so excessive as to appear to have been given under the influence of passion or prejudice. In many personal injury cases that are brought before us, the damages assessed are larger than we think should be awarded, but under the Code we have no authority to grant a new trial merely on the ground of excessive damages unless the damages appear to have been given under the influence of passion or prejudice; or, in other words, are so excessive as to be entirely out of proportion to the injury sustained. The question of the amount of damages that shall be recovered in this class of cases is primarily for the jury. They are as well, if not better, qualified than we are to arrive at a fair and just conclusion as to what amount of damage should be allowed, and, although we may not agree with their assessment, our uniform practice has been not to interfere with it unless for the causes stated; and hence we do not see our way clear to order a new trial on this ground.

Section 363 of the Civil Code of Practice provides that: "An action upon contract, wherein the summons has been served in due time, as provided in Section 102, upon part only of the defendants, shall stand for trial at the first term as to those so summoned, and may be continued as to the others for further proceedings. In other ordinary actions the plaintiff can only demand a trial at any term as to part of the defendants upon his

discontinuing his action on the first day of such term as to the others."

And as it appears that Rosenberg was the only defendant served with process or before the court, it is contended that the appellee was not entitled to a trial until all of the defendants were summoned or until he had discontinued his action as to those not summoned.

Under this section of the Code it would be error to force the defendant into trial in an ordinary action like this unless all of the defendants were before the court or the plaintiff discontinued his action as to those not before the court. *Hedger v. Downs*, 2 Met., 160; *Baumeister v. Markham*, 101 Ky., 122; *Adkins v. Kendrick*, 131 Ky., 779.

But this provision of the Code is intended for the protection and benefit of the defendant. He may, if he chooses to do so, object to a trial unless all the defendants are summoned or the plaintiff discontinues his action as to those not summoned, or he may waive his right to claim the benefit of this statute by failing to object to the trial in seasonable time, and if he does so fail to object, he cannot thereafter avail himself of this code provision either in the trial court or in this court. In this case the record shows that no motion for a continuance, or objection to the trial before the other defendants had been brought before the court, or the action as to them was discontinued, was made, and we may well assume that the capable and experienced counsel for appellant were not averse to going into trial at the time the case was called without either asking for a continuance or moving that the plaintiff discontinue his action as to the defendant not summoned.

Another objection is to the form of the judgment. Of course, the judgment is void as to Romiser and he is not complaining of it; nor do we perceive how the rights of Rosenberg are prejudicially affected by the fact that the judgment, in addition to going against him, went against "others, partners doing business under the firm name and style of Royal Milling Co." Rosenberg was the only party before the court, the only person who filed an answer or made defense, and it would be the merest trifling to say that the surplus matter in this judgment should render it void as to Rosenberg.

Upon the whole case, we perceive no substantial error to the prejudice of the appellant, and the judgment is affirmed.

**Damron, et al. v. Justice.**

(Decided January 12, 1915.)

**Appeal from Pike Circuit Court.**

1. **Easements—Obstruction—Evidence.**—In an action to enforce a right of passway to a graveyard, evidence examined and held to sustain the finding of the chancellor that the passway was obstructed.
2. **Easement—Obstruction—Action to Enforce—Cost.**—Where plaintiff is compelled to bring an action in order to enforce his right of passway to a graveyard, he is entitled to recover of defendants the cost of the action, including the cost of laying off the half-acre of ground including the graveyard, and establishing a route thereto.
3. **Easements—Passway—Gates—Erection, Maintenance, Closing and Fastening—Duties of Owner of Passway and Owner of Servient Estate.**—Where a deed reserving a passway to a graveyard contains no stipulation to the contrary, it is not error to impose on the owner of a passway the duty of erecting, maintaining, closing and fastening the gate leading from the public road to the passway.
4. **Deeds—Exception—Construction.**—Under a deed of conveyance excepting therefrom one-half acre of land at the grave, including the graveyard, with privileges of passing to and from said graveyard, the land excepted can be used only for graveyard purposes.

J. S. CLINE for appellants.

ROSCOE VANOVER for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER**—Affirming on original and cross-appeals.

On March 25, 1887, James A. Justice and wife conveyed to Eliza Ratliff a tract of land located in the county of Pike. The deed, after describing the land conveyed, contains the following provision:

“Excepting one-half acre of land at the grave, including the graveyard, with privileges of passing to and from said graveyard; unto the second party, her heirs and assigns forever, together with all its appurtenances thereunto belonging, except the said half an acre at the graveyard, to her heirs and assigns forever.”

Subsequently Eliza Ratliff married A. J. Charles, and she and her husband conveyed the property to Florence Charles Damron, the deed to take effect upon their death.

Alleging that he was the owner of one-half acre of land, including the graveyard, and of a right of passway to and from the graveyard, and that the defendants, Luther Damron, Florence Damron, and A. J. Charles, had wrongfully obstructed his passway by building a barbed-wire fence, plaintiff, J. A. Justice, brought this action against the defendants to enforce his right of passway to and from the graveyard, and to have laid off to him one-half acre of ground at the graveyard. On final hearing the chancellor adjudged that plaintiff was entitled to have laid off for graveyard purposes alone one-half acre in a square including the graveyard. Commissioners were appointed to survey and locate the half acre of ground, the site for a gate, and the route from the graveyard to the public road. Plaintiff was authorized to erect a gate leading from the public road. The duty of maintaining, closing and fastening the gate was imposed on him. From this judgment the defendants appeal and the plaintiffs prosecute a cross-appeal.

One of the main contentions of defendants is that, as plaintiff owns land adjoining the land of defendants, and it is practicable for him to go over his own land and then go over defendants' land for only a short distance in order to reach the graveyard, he should not have been adjudged a passway from the public road, but only from the nearest point on his own land. We see no merit in this contention, for the passway was not made to depend upon the ownership of the adjoining land, or made appurtenant thereto. The right of passway was entirely independent of the adjoining land. Though plaintiff might sell the adjoining land, he would still have the privilege of going to and from the graveyard over the land of the defendants.

The evidence shows that the graveyard is about 200 yards from the public road. There had been a passway from the public road up to the graveyard. Defendants built a barbed-wire fence obstructing plaintiff's ingress and egress along this route. Defendants insist that they offered plaintiff another route to the graveyard, which, though somewhat longer, was altogether practicable and feasible. This plaintiff denies. On the question of obstruction we see no reason to disturb the finding of the chancellor, and since plaintiff was forced to bring the action in order to enforce his right of passway, and succeeded in establishing his claim, it was proper that the

costs of the action, including the cost of laying off the half-acre of ground and establishing the route to the graveyard, should be adjudged against defendants.

The court did not err in imposing on plaintiff the duty of erecting, maintaining, closing and fastening the gate at the public road. The deed contains no stipulation to the contrary, and, in the absence of such stipulation, those duties devolve upon the owner of the passway. 14 Cyc., 1210; *Rowe v. Nally*, 81 Md., 367, 32 Atl., 198; *Brill v. Brill*, 108 N. Y., 511, 15 N. E., 538; *Maxwell v. McAtee*, 9 B. Mon., 20, 48 Am. Dec., 409.

Plaintiff also insists on his cross-appeal that he should have been adjudged the title to the half-acre of ground without any restriction as to its use. If plaintiff's title be absolute, it follows, of course, that he may not only abandon the graveyard and still retain the possession of the right of way to it, but may sell it and convey it to strangers to be used for that or any other purpose. This construction of the deed cannot be sustained. Considering its language, and the circumstances of the parties, we think it clear that the intention of the parties was to indicate with reasonable certainty the purpose for which the half-acre was excepted. While it may be true that the title to the half-acre remains in plaintiff, yet the parties had a right to annex a condition to its use and enjoyment. In the case of *Brown, &c. v. Anderson*, 88 Ky., 577, where similar language was employed, we so ruled; and that case cannot be distinguished from this. It follows that the chancellor properly adjudged that the half-acre of ground excepted from the provisions of the deed should be laid off to the plaintiff for use only as a graveyard.

Judgment affirmed, both on original and cross-appeals.

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### **Biggs v. Commonwealth.**

(Decided January 12, 1915.)

Appeal from Carter Circuit Court.

**Criminal Law—Indeterminate Sentence—Instruction.**—Under the indeterminate sentence law the jury, after being first advised of the minimum and maximum punishment fixed by law, should be instructed if they find the defendant guilty to fix a minimum

sentence for any time in their discretion under the maximum and not less than the minimum sentence fixed by law and a maximum sentence for any time in their discretion greater than the minimum sentence but not more than the maximum punishment fixed by law.

G. W. E. WOLFFORD, SCOTT & HAMILTON and CALHOUN B. WILHOIT for appellant.

JAMES GARNETT, Attorney General, for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

This is a second appeal of this case. The opinion on the former appeal may be found in 159 Ky., 836, and, as the facts are fully stated in that opinion and the evidence on the trial from which this appeal is prosecuted is the same as the evidence on the trial from which the first appeal was prosecuted, it is not necessary to encumber this opinion with a re-statement of the facts.

Several errors are relied on for reversal, but the only substantial one is found in instruction number two. In that instruction, which advised the jury of their right to find the defendant guilty of voluntary manslaughter, they were told that if they did find him guilty of voluntary manslaughter, they should "say in their verdict that he shall be confined in the penitentiary for a period of not less than two nor more than twenty-one years." And the jury returned the following verdict: "We, the jury, agree to find the defendant, Buck Biggs, guilty under instruction of the court number two, and fix his punishment at confinement in the penitentiary for a period of not less than two nor more than twenty-one years."

The crime for which appellant was indicted and convicted was committed on May 25, 1914, which was after the indeterminate sentence law of 1914, now section 1136 of the Kentucky Statutes, went into effect, and so much of this act as is pertinent to the question under consideration reads:

"If the jury find the defendant guilty, they shall fix and render against the defendant an indeterminate sentence or judgment of imprisonment in the penitentiary for an indefinite term, stating in such verdict the minimum and maximum limits thereof, but the said minimum time shall not be less than the minimum time, nor the maximum time greater than the maximum time of imprisonment prescribed by law for the punishment of the offense stated in the verdict, and, as the maximum

time of imprisonment, the term now or hereafter prescribed by law as the maximum term of imprisonment for the punishment of such offense, and thereupon the court shall render a judgment in conformity with such verdict."

Under this act when the statute fixes a minimum and a maximum punishment for an offense, as, for example, voluntary manslaughter, the punishment for which is confinement in the State penitentiary for a term of not less than two nor more than twenty-one years, the jury have the right to fix the minimum sentence at any period under twenty-one years and not less than two years, and the maximum sentence at any period over the minimum sentence, but not greater than twenty-one years. Or, to state it differently, the jury may fix the minimum punishment at two, or five, or ten, or twelve, or even twenty years, and they may fix the maximum punishment at any time they desire greater than the minimum punishment, but, of course, cannot exceed the maximum punishment fixed by law. So that a jury might find the defendant guilty of voluntary manslaughter and fix his punishment at confinement in the penitentiary for a term of not less than two nor more than five years, or for a term not less than five nor more than ten years, or for a term not less than ten nor more than twenty-one years. But, under the instructions, the jury were told, in effect, that, if they found the defendant guilty of voluntary manslaughter, they must fix the minimum punishment at two and the maximum at twenty-one years, and it seems quite evident from the verdict of the jury, which followed the wording of the instruction, that they were under the impression that they were confined to fixing the minimum punishment at two and the maximum punishment at twenty-one years. But, whether the jury had this view of the instruction or not, it did not correctly state the law as declared in the indeterminate sentence act.

The jury should have been advised by the instruction that, if they found the defendant guilty of voluntary manslaughter, they should fix a minimum sentence for any time in their discretion under twenty-one years and not less than two years, and a maximum sentence for any time in their discretion greater than the minimum sentence and not more than twenty-one years. Under an instruction such as should have been given the jury might have fixed the minimum sentence at two years and the

maximum sentence at any period from over two to twenty-one years, and need not have fixed the maximum at twenty-one years as the instruction apparently told them they must do.

We also think the court should have permitted the affidavit for a continuance to be read when it was offered, although it was offered out of time.

Instruction No. 3, on the subject of the right of appellant to kill the deceased in defense of his brother, is also erroneous. On another trial the court should instruct the jury on this point in the manner and form laid down in *Arnett v. Commonwealth*, 137 Ky., 270; *Stanley v. Commonwealth*, 86 Ky., 440; *Pace v. Com.*, 89 Ky., 204.

The judgment is reversed with directions for a new trial in conformity with this opinion.

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### **Campbell v. Commonwealth.**

(Decided January 13, 1915.)

Appeal from Perry Circuit Court.

1. **New Trial—Capital Offense—Trial for—Separation of Jury—When Ground for New Trial.**—Where on the trial of the accused under an indictment for murder, the officer in charge of the jury left eleven of them at night, unattended and unguarded from intrusion, in the room of the house where they were boarded, and took the twelfth juror to a drug store two or three hundred yards distant, and permitted him to remain there long enough to purchase and eat ice cream, before returning with him to the eleven jurors at the boarding house; and on yet another occasion, in conducting the jury to their boarding house, during a recess of the court, permitted a juror to straggle at a distance of eight feet behind the other eleven and hold a conversation with an outsider, not in the presence or hearing of the officer, these derelictions of duty on the part of the latter caused such a separation of the jury as to entitle the accused to a new trial.
2. **New Trial—Opportunity for Interference With Jury—What Commonwealth Must Show.**—Where a separation of the jury has been allowed by the officer in charge of them, the court, trying the case, cannot afford to speculate as to what might or might not have been done by evilly disposed persons to improperly influence the verdict of the jury. In such case it devolves upon the Commonwealth to show that such separation gave no opportunity for the exercise of improper influences on them.

E. E. HOGG, J. E. JOHNSON and T. J. EVERSOLE for appellant.

JAMES GARNETT, Attorney General, and OVERTON S. HOGAN, Assistant Attorney General, for appellee.



## OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

On the 6th day of September, 1913, the appellant, Green Campbell, a resident of Perry county, shot and killed Green Morris in that county. At the succeeding term of the Perry Circuit Court he was indicted for the homicide, the crime charged being murder. His trial occurred at a subsequent term of the court and resulted in a verdict finding him guilty of voluntary manslaughter, following which, by indeterminate sentence and judgment of the court, his punishment was fixed at confinement in the penitentiary not less than two nor more than twenty-one years. From that judgment and the refusal of the circuit court to grant him a new trial he has appealed.

The grounds urged for the new trial and now relied on for a reversal of the judgment of conviction are: 1. The verdict of the jury was flagrantly against the evidence. 2. The court did not properly instruct the jury. 3. The court erred in overruling appellant's motion and grounds for a new trial. The third of these grounds will first be considered.

It is insisted for appellant that the court should have granted him a new trial because of the misconduct of K. C. Combs in permitting the jury to be separated and one of them to be talked to apart from the others, while in his charge. It appears from the record that by agreement of appellant and the Commonwealth Combs was sworn and placed in charge of the jury after it was accepted and sworn, and, although both he and the jury were by the court given the proper admonition required in such a case, it appears from affidavits that were filed in support of the motion and grounds for a new trial that on one occasion, during the trial and at night while the court was not in session, Combs, after taking the jury to the house where they were boarded, left eleven of them in a room thereof, unguarded and unsecured from intrusion, and himself took the twelfth juror, Clark Gay, to a drug store two hundred or three hundred yards distant from the boarding house, where Gay was permitted to purchase a saucer of ice cream and remain in the drug store long enough to eat it, following which Combs returned with him to the boarding house, where they rejoined the other eleven jurors. It also appears from another of the affidavits that on yet another occasion during the trial and while Combs had charge of

the jury and was conducting them to their boarding house, one of the jurors, who was walking about eight feet behind the other eleven, was joined by another man, not of the jury and unknown to the affiant, who walked by his side for some distance and appeared to engage him in conversation.

A counter-affidavit from Combs was filed, in which he admitted leaving eleven of the jurors in a room of the boarding house unattended, while he accompanied Gay, the twelfth juror, to the drug store, where they remained long enough for Gay to purchase and eat the ice cream, after which they returned to the other eleven jurors at the boarding house. Combs' affidavit contained the further statement that he and Gay were not away from the boarding house exceeding five minutes, and that at no time during their absence therefrom was Gay approached or talked to by any one about appellant's trial, or on any subject connected with the case.

We think it patent, however, that Combs labored under a mistake as to the time he and Gay were absent from the boarding house, for it is improbable that they could have walked the distance of two or three hundred yards, remained in the drug store long enough for the ice cream to be purchased and eaten by Gay, and then returned the same distance to the boarding house, in five minutes' time. Be this as it may, the facts disclosed by the affidavits filed in appellant's behalf and those admitted by Combs' affidavit show a separation of the jury and that Combs' custody of them was so lax as to afford opportunities for them to be approached and corruptly or otherwise improperly influenced by outsiders. One of these opportunities was given the unknown person, who, by reason of Combs' inattention to his duties, was seen to walk and converse with a juror straggling in the rear of the other eleven. Another opportunity for interference with the jury was given when he left eleven of them unguarded at the boarding house while he and Gay visited the drug store. It is not material that the opportunities referred to were not shown to have been taken advantage of. Courts of justice cannot afford to speculate as to what might or might not have been done by evilly disposed persons in improperly influencing the verdict of the jury under such circumstances. Where, in a case involving a capital offense, a separation of the jury, in charge of an officer of the court, has occurred, it

devolves upon the Commonwealth to show that such separation gave no opportunity for the exercise of improper influence on them.

In *French v. Commonwealth*, 100 Ky., 63, the facts were quite similar to those of the instant case. The accused was on trial for murder and following the submission of the case to the jury, a juror was permitted by the verbal assent of the trial judge, and in charge of a deputy sheriff, to go to his place of business in the city of Louisville, some blocks away from the courthouse, for a purpose necessary to his business. About twenty minutes later the juror, in charge of the deputy, returned to the other eleven jurors at the hotel to which they had been taken. The accused, upon ascertaining these facts upon the following morning, and before the jury returned a verdict, made a motion to discharge the jury. The motion was overruled and a verdict of guilty returned. On appeal we held that this separation was such an error as compelled a reversal of the judgment. In the opinion it is said:

“Section 244 of the Criminal Code provides that ‘on the trial of offenses which are or may be punished capitally, the jurors, after they are accepted, shall not be permitted to separate, but shall be kept together, in charge of the proper officers. On the trial of other felonies the jurors, before the case is submitted to them, may be permitted to separate, in the discretion of the court; but after the case is submitted they shall be kept together in charge of an officer. On the trial of misdemeanors the jurors may be permitted to separate at any time until finally discharged, or the court may order them to be kept together.’ It is seen that on the trial of capital offenses the provision is explicit that the jurors, after acceptance, shall not be permitted to separate, but shall be kept together, and the only provision which even looks toward an exception or modification is found in Section 251, Criminal Code, which is as follows: ‘If, after retirement, one of the jurors become so sick as to prevent the continuance of his duty, or other accident or cause occur, preventing them being kept together, or if, after being kept together such a length of time as the court deems proper, they do not agree in a verdict, and it satisfactorily appear that there is no probability they can agree, the court may discharge the jury; or if the sickness of a juror be temporary, the court may permit him to sepa-

rate from the other jurors, and may place him in charge of an officer, or not, in its discretion.' We are not disposed to so construe this section as to prevent the court, by order of record made in the presence of the accused and his counsel, from permitting a separation when required by the sickness only of a juror. A fair construction would be to allow it when such separation is required by accident or other cause of such an imperative character as would be the sickness of the juror. Certainly the mere convenience or comfort of a juror ought not to be held to furnish such a cause. This safeguard of the ancient law, alike vitally important to the State and to the accused, must not be impaired or frittered away. Manifestly the occasion here furnishes no cause for the separation within a fair construction of the law; and, if it did, it must yet, in all cases of separation, be shown clearly by the State that no opportunity has been afforded for the exercise of improper influences on the juror. The explanations offered here for traveling about the street are indefinite, if not evasive. It is proper to say that no actual wrong or evil motive is imputed to the juror or deputy in this case."

It is true that in numerous other cases this court has held that where there has been a separation of the jury, even in a capital case, it was without jurisdiction to review the ruling of the circuit court in refusing the accused a new trial for that cause, where the separation of the jury was first brought to the attention of that court on motion for a new trial. *Brown v. Commonwealth*, 122 Ky., 626; *Howard v. Commonwealth*, 118 Ky., 1; *Curtis v. Commonwealth*, 23 R., 267; *Vinegar v. Commonwealth*, 104 Ky., 106; *Kennedy v. Commonwealth*, 14 Bush, 340. But this was because such jurisdiction was expressly denied by Section 281, Criminal Code. Now, however, under that section, as amended by the act of March 23, 1910 (Acts 1910, page 269), the rulings of the circuit court on motions for a new trial are subject to exceptions, and any error of that court in refusing a new trial, moved for on the ground we are now considering, even though first brought to the attention of the circuit court on the motion for a new trial, may be reviewed by this court. *Wilson v. Commonwealth*, 140 Ky., 1; *Commonwealth v. Harris*, 147 Ky., 702; *Blanton v. Commonwealth*, 147 Ky., 812; *Collins v. Commonwealth*, 143 Ky., 60; *Gleason v. Commonwealth*, 145 Ky., 128; *Miracle v. Commonwealth*, 148 Ky., 253.

If correct in the conclusion that the ruling of the circuit court in refusing appellant a new trial, because of the separation of the jury under the circumstances manifested by the evidence, was prejudicial error, it necessarily follows that the judgment appealed from must be reversed upon that ground; and with respect to the first ground urged for a reversal, without expressing an opinion as to the weight or effect of the evidence, it is sufficient to say that upon another trial it will authorize the submission of the case to the jury. As to the complaint made in the second ground for a reversal, we deem it only necessary to say that, in our opinion, the instructions given on the last trial are free from objection, and that they, on the whole, advised the jury of all the law applicable to this case.

For the reasons indicated the judgment is reversed and cause remanded for a new trial consistent with the opinion.

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### **Walker, et al. v. Commonwealth.**

(Decided January 13, 1915.)

#### **Appeal from Carter Circuit Court..**

1. **Perjury—False Swearing—Trial Under Indictment for—Instructions.**—On the trial of one indicted for false swearing, it was error in the court to fail to instruct the jury that before they could convict the accused his guilt must be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances.
2. **Perjury—False Swearing—Indictment for—Improper Joinder.**—False swearing or perjury is not an offense for which two or more persons can be jointly indicted. The offense can only be committed by an individual in his individual capacity. The crime being distinct, several persons cannot be joined, only one can be made defendant.

H. L. WOODS for appellant, William Walker.

CALHOUN B. WILHOIT for appellant, Dave Hall.

R. T. KENNARD for appellant, Dave Hall.

JAMES GARNETT, Attorney General, for appellee.

**OPINION OF THE COURT BY JUDGE SETTLE—Reversing.**

Appellants, Bill Walker and Dave Hall, were jointly indicted by the grand jury of Carter county for the crime of false swearing, and, upon being jointly tried, were each found guilty by the verdict of the jury, their punishment being fixed by judgment of the court at imprisonment in the penitentiary for one year each. They were refused a new trial and both have appealed.

Without discussing all the grounds urged for a new trial, and now relied on for a reversal, it is sufficient to say that the complaint that the circuit court failed to properly instruct the jury as to all the law of the case must be sustained. In other words, the trial court did not instruct the jury, as it should have done, that before they could convict either of the defendants in this case, their guilt must be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances. This omission will compel the reversal of the judgment. As said in *Goslin v. Commonwealth*, 121 Ky., 698:

"This is an old rule of evidence, and therefore a rule of law, applicable to the rights of persons as well as to the rights of property. It is not merely a technical rule, but one of substantial justice, and founded upon a safe and wise public policy. Not only would it be unsafe, as it is sometimes said of it, that one man's oath in such matter should outweigh another's, which is possibly not entirely satisfactory, in view of the fact that it may do so in respect to property, or even life, but it is a matter of first importance in the administration of justice that witnesses should feel themselves safe in testifying to their own conception, recollection, and honest belief as to the facts forming the subject of inquiry in the courts. If it were so that one man could be convicted of perjury or false swearing by the oath alone of another who testifies to the contrary, the timid and the humble and obscure would not feel safe, and would not be safe, in giving their testimony where it might be opposed by that of one of influence and prominence. It is right that the jury, or other tribunal trying the fact, should have the privilege of weighing the evidence, or discrediting one witness entirely and believing another, according to the probability of the matter as it seems to them; but if the law allowed that one man's oath might convict another of perjury or false swearing, the effect would be to deter the timid and obscure person, and to that extent retard the administration of pure justice.

It would deprive the court or jury, in many instances, of a full hearing from all who might have knowledge as witnesses of the facts being tried. \* \* \* This wise old rule of the common law is one which this court has always recognized and enforced. It applies alike to prosecutions for false swearing and perjury; for those offenses are alike, and the principles and policy of the law applicable to one, save wherein modified by statute, apply to the other. (Commonwealth v. Davis, 92 Ky., 460, 13 Ky. Law Rep., 676, 18 S. W., 10.)”

Although instruction No. 1 is not specifically objected to, as the appellants will doubtless be further prosecuted, we deem it proper to say that the instruction incorrectly submitted to the decision of the jury the question whether the false statements alleged to have been made by the appellants were made in answer to questions “that could be legally asked.” It was the duty of the court to determine whether the questions to which they made the false answers, if any, were such as could legally be asked them. So the words quoted should have been omitted from the instruction and the words “were asked them” substituted therefor. In addition, the instruction should have advised the jury in clearer language that, in order to find the appellants guilty, it was not only necessary that they believe from the evidence, beyond a reasonable doubt, that the statements made by them were false, but also that they (appellants) knew them to be false when made.

We find no merit in appellants’ complaint of the trial court’s refusal of the peremptory instruction asked by them. Without expressing an opinion as to the weight or effect of the evidence, we think it was sufficient to authorize the submission of the case to the jury, although we are constrained to set aside the verdict and direct a new trial because of the court’s failure to properly instruct them.

While the appellants make no complaint of their being jointly indicted for the crime charged, we think the joinder was unauthorized. The offense charged is not an offense in which two or more persons may participate, and for which they may be jointly indicted or tried, as in murder or other crimes, in the commission of which there may be accomplices or accessories. False swearing or perjury is an offense which can only be committed by an individual in his individual capacity. As said in Roberson’s Criminal Law, Section 349:

"The crime being distinct, several persons cannot be joined. Only one can be made defendant. Even supposing two persons do swear jointly to the same affidavit, it is impossible to suppose that they did so at the same moment of time, so as to make the offense exactly joint." Wharton Crim. Law, Section 1253.

In view of this conclusion, upon the return of the case to the court below, the present indictment should be dismissed and the case remanded to the grand jury, that appellants may be separately indicted for the offense charged.

Appellants' complaint of the refusal of the circuit court to grant them the continuance asked will not be considered, as they will have ample opportunity to procure the attendance, for the next trial, of all their witnesses who were absent at the last trial.

For the reasons indicated the judgment is reversed and cause remanded for a new trial and further proceedings consistent with the opinion.

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### **Commonwealth v. Tidwell.**

(Decided January 13, 1915.)

#### **Appeal from Livingston Circuit Court.**

1. **False Pretenses—Indictment for—When Defective.**—An indictment for obtaining money by false pretenses, which charges the defendant with inducing the prosecutrix to buy of him a picture and picture frame, at a price not greater than its actual value, by falsely representing to her that a person or company, unnamed, whom he represented, would at some time in the future, not indicated, give her a Singer sewing machine, does not state an offense under the statute; hence, a demurrer to such indictment was properly sustained.
2. **False Pretenses—False Promise—When Not a False Pretense.**—A false promise to do something resting upon an event to happen in the future, is not within the statute denouncing false pretenses, unless it is coupled with a false statement or representation as to a past or existing fact, or facts, which induces another to rely upon the false promise, and by reason thereof, be defrauded and deprived of his money or property.

JAMES GARNETT, Attorney General; CHARLES H. MORRIS, Assistant Attorney General, and JOHN L. GRAYOT for appellant.

HENDRICK & NICHOLS for appellee.



**OPINION OF THE COURT BY JUDGE SETTLE—Affirming.**

The grand jury of Livingston county, at the July term, 1913, of the circuit court thereof, returned against the appellee, G. W. Tidwell, the following indictment:

“The Grand Jurors of the County of Livingston, in the name and by the authority of the Commonwealth of Kentucky, accuse G. W. Tidwell of the crime of Obtaining Money by False Pretenses, Statements and Tokens, committed in manner and form as follows, to-wit: The said Tidwell, in the said County of Livingston, on the — day of June, 1913, and before the finding of this indictment, did, by false pretenses, statements and tokens, with intentions to commit a fraud, obtain from Mrs. Tom Champion twelve dollars and seventy cents in money, United States Currency, which may be the subject of Larceny, by stating, representing and pretending to the said Mrs. Tom Champion that she would receive a Singer Sewing Machine from the persons he was representing if she would pay to and deliver to him said amount in payment for an enlarged picture and picture frame, which said statement, representation and pretense was false and untrue, and so known to be by said G. W. Tidwell when he made it, for in truth and in fact Mrs. Tom Champion would not and did not receive a Singer Sewing Machine, or any Sewing Machine, from the person he was representing on payment to said G. W. Tidwell of the said amount of money aforesaid as payment for an enlarged picture frame, and the said G. W. Tidwell well knew she would not, and that said persons he was representing did not have any Singer Sewing Machine to give or send as aforesaid. The said Mrs. Tom Champion, believing and relying on the statements, representations and pretenses made to her by said G. W. Tidwell, as aforesaid, delivered and gave to him, said G. W. Tidwell, twelve dollars and 70 cents in money and the said G. W. Tidwell received and accepted and kept the said amount of money as given him by said Mrs. Tom Champion. At the time the said Mrs. Tom Champion gave and delivered the said money to said Tidwell she did not know and had no reasonable way of knowing that the said statements, representations and pretenses so made to her by said Tidwell were false against the peace and dignity of the Commonwealth of Kentucky.”

Appellee filed a demurrer to the indictment, which the circuit court sustained, and from the judgment manifesting that ruling the Commonwealth has appealed.

"While it must be conceded to be the law that a false promise to do something, resting upon an event to happen in the future, is not within the statute denouncing false pretenses, yet it is equally true that a promise of future performance, when coupled with a false statement as to a past or existing fact or facts, which induces another to rely upon the false promise, will, in connection with the false statement as to the existing fact or facts, constitute a 'false pretense' in the meaning of the statute, and conviction thereon may be had." *McDowell v. Commonwealth*, 136 Ky., 8; *Smith v. Commonwealth*, 141 Ky., 534; *Murphy v. Commonwealth*, 96 Ky., 29; 2nd *Roberson's Crim. Law*, 666.

It is manifest that the false pretense set forth in the indictment was solely as to a future event. It will be observed that appellee represented to Mrs. Champion that she would receive a Singer sewing machine from the person represented by him, if she would pay him \$12.70 for an enlarged picture and picture frame which he then had and was attempting to sell her. The indictment does not give the name of the person whom appellee claimed to represent; nor does it allege that appellee represented that he or such person then had the sewing machine Mrs. Champion was to receive; nor is it therein alleged that he indicated any time or date for the delivery to her of the sewing machine. In the absence of an averment to the contrary, the presumption will be indulged that the picture and frame were delivered by appellee to Mrs. Champion at the time the transaction took place and that they were then worth the \$12.70 which she paid appellee for them.

It should further be remarked that it is not alleged in the indictment that the representations as to the existing facts were false; that is, that there were any false representations made by appellee as to the character or value of the picture or frame, or as to appellee's ownership thereof, or his right to sell same to Mrs. Champion; nor is it alleged in the indictment that Mrs. Champion was not a person of ordinary intelligence and prudence. If the picture and frame were, as we must suppose, of the value of \$12.70, Mrs. Champion was not actually defrauded in the transaction. As the

indictment does not allege that appellee represented the value of the picture and frame to be greater than it was, or that it was in fact less than \$12.70, Mrs. Champion, being a person of ordinary intelligence, must be presumed to have known what they were worth and to have willingly paid for them the price charged; and, if the representation of appellee that there would be a future delivery to her of a sewing machine was an inducement to her purchase of the picture and frame, its delivery could only have been expected as a bonus and not as a part of the consideration for which she parted with the \$12.70.

The indictment, it is true, alleges that the statement of appellee that Mrs. Champion would receive the sewing machine was a false representation and that the machine was never, in fact, delivered to her, but this false representation was solely as to an event to happen at an uncertain time in the future, and was, therefore, a mere promise of future performance, unconnected with a false statement as to a past or existing fact, for, as already said, there was no false statement or representation made by him as to his right to sell her the picture and frame, or as to its value. We are of opinion, therefore, that the facts alleged in the indictment do not bring the acts of appellee within the statute denouncing false pretenses.

We do not agree with the contention of appellant's counsel that this case is controlled by the opinion in *Commonwealth v. Murphy, supra*. In that case the defendant fraudulently obtained from another \$1.25 by falsely representing to him that he, defendant, then possessed authority to give, and would give, him the place of night watchman at a railroad depot; the money being, as represented, necessary to send to headquarters. There was, therefore, in that case a false representation by Murphy as to an existing fact, namely, that he had authority to procure the appointment of a night watchman, coupled with which was the further false pretense that the appointment of the person from whom he obtained the \$1.25 would be made in the future, the two combining to defraud the latter, to whom the false representations were made, out of the money paid Murphy by him. In the instant case there were no fraudulent statements or representations as to a past or existing fact, the only false representation alleged consisting in

a false promise resting upon an event to happen at an unnamed time in the future, which does not constitute a false pretense in the meaning of the statute.

The indictment failing to charge a public offense, the demurrer to it was properly sustained by the circuit court, wherefore, the judgment is affirmed.

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### **Buskirk v. Commonwealth.**

(Decided January 13, 1915.)

#### **Appeal from Pike Circuit Court.**

1. **Constitutional Law—Alteration of Liquor Laws—**Section 59 of the Constitution does not prohibit the General Assembly from enacting a general law relating to an alteration of the liquor laws.
2. **Constitutional Law—Authority of Legislature to Enact a General Law for the Alteration of the Liquor Laws—**Section 61 of the Constitution authorizes the Legislature to enact a law, whereby the sense of the people of any county, city, town, district, or precinct may be taken as to whether or not spirituous, vinous or malt liquors may be sold, bartered, or loaned therein or the sale thereof regulated.
3. **Intoxicating Liquors—Manner of Repealing Prohibitory Law—**Section 2554 of the Kentucky Statutes authorizes a vote to be taken as to whether or not any prohibition law in force in any county, city, town, district, or precinct by virtue of any general or special act or acts shall become inoperative.
4. **Intoxicating Liquors—Local Prohibitory Laws—**Local prohibitory laws relating to the sale of liquors enacted by the General Assembly prior to the adoption of the present constitution, remain in force until annulled as provided in Chapter 81, of the Kentucky Statutes, and amendments thereto.

WHITT & SHANNON for appellant.

JAMES GARNETT, Attorney General, and R. T. CALDWELL, Assistant Attorney General, for appellee.

#### **OPINION OF THE COURT BY JUDGE HURT—Reversing.**

At the September term, 1914, of the Pike Circuit Court the appellant, R. W. Buskirk, was indicted by the grand jury of Pike county, and charged with the offense of violating the local option law by selling spirituous liquors to another in said county on the 14th day of September, 1914, the same being a territory wherein local option was in force. To this indictment the appellant

entered a plea of not guilty, and upon the trial of the case the circuit court found him guilty of violating the local option law and assessed a fine of \$60.00 against him in favor of the appellee.

For the purpose of the trial of the case in the circuit court the appellant and appellee agreed upon and submitted to the court an agreed state of facts in the case. It was agreed that in the year 1884 the General Assembly of Kentucky enacted a law prohibiting the sale of intoxicating liquors or mixtures thereof in the counties of Pike, Martin, and Letcher. It was further agreed that in the year 1901 the number 12 voting precinct, known as Blackberry, in Pike county, voted upon the question of whether or not spirituous, vinous, or malt liquors should be sold within said precinct, and that at said election a majority of the voters in said precinct cast their votes in favor of the sale of spirituous, vinous and malt liquors, within said precinct, and that said election was regularly held as provided for in Chapter 81 of the Kentucky Statutes, known as the Local Option Law, and that the returns of said election were properly certified and canvassed as required by said law, and the certificate thereof recorded as required by said law, and that since said time no election upon that subject has been had in said precinct, nor in the county of Pike as a unit.

It was also agreed that the appellant has whisky in his possession in said Blackberry precinct, stored for the purpose of sale, and that at the time alleged in the indictment, and previous to that time, the appellant has had a tax stamp of the United States Government for the purpose, and authorizing him, so far as the internal revenue laws of the general government relate, to sell spirituous, vinous and malt liquors by retail at a place where his liquors are stored within the boundary of said precinct. It was further agreed that if, under the facts stated above, the sale of intoxicating liquors was not authorized by law in said territory, that the court should find the defendant guilty under the charge in the indictment stated, but, if, under the facts stated, the sale of such liquors was authorized by law in said precinct, the court should find the defendant not guilty. As a part of said agreement a certified copy of the order for taking the vote in said precinct in the year 1901, relative to the sale of whisky therein, was made a part of the record.

Upon this state of facts the court adjudged that the Local Option Law was in force in said Blackberry precinct under act of 1884, which prohibited the sale of whisky in Pike, Martin and Letcher counties, and the election held in said Blackberry precinct in 1901 did not affect said act, and further adjudged that the defendant was guilty of violating the Local Option Law as charged in the indictment, and fixed his punishment as aforesaid. The appellant filed grounds and entered a motion for a new trial, which was overruled by the court, and he appeals to this court.

On April 17th, 1884, the General Assembly enacted a law applying to the counties of Pike, Letcher and Martin, which provided that after the 15th day of June, 1884, "that it shall be unlawful for any person, persons, or corporation to sell any spirituous, vinous, or malt liquors, or a mixture of either in the counties of Letcher, Pike, or Martin, and any person thus offending shall be deemed to have been guilty of a high misdemeanor, and, upon indictment by a grand jury, and conviction thereof, shall be fined in any sum not less than \$100.00, nor more than \$200.00." This act may be found on page 70 of the Session Acts of 1883-4.

It seems that the only question to be determined by this court is as to whether or not this local prohibitory law of April 17th, 1884, is still in full force and operation within the said Blackberry precinct of Pike county, wherein it is agreed that the appellant committed the offense for which he was indicted and convicted. Section 59 of the Constitution provides that the "General Assembly shall not pass local or special acts to provide a means of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquors or alter the liquor laws."

This section of the Constitution, however, did not prohibit the Legislature from enacting a general law relating to the alteration of liquor laws in any portion of the State, but by Section 61 of the Constitution expressly authorized the Legislature to enact such a law. Section 61 of the Constitution is as follows, namely:

"The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district, or precinct may be taken as to

whether or not spirituous, vinous, or malt liquors shall be sold, bartered, or loaned therein, or the sale thereof regulated, but nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election day."

In conformity to the requirements of Section 61 of the Constitution, the General Assembly, by an act of March 10th, 1894, commonly called the Local Option Law, provided a general law for the taking of the sense of the legal voters of any county, city, town, district, or precinct as to whether or not spirituous, vinous, or malt liquors might be sold therein. By the first section of said act, which is Section 2554, of the Kentucky Statutes, it is provided that a vote may be taken by the persons who are qualified to vote at elections for county officers, as to "whether or not any prohibition law in force in any county, city, town, district, or precinct, by virtue of any general act or special act or acts, shall become inoperative, and counties, cities, towns, districts, and precincts in which the sale, barter or loan of spirituous, vinous, or malt liquors are now prohibited may have a vote thereon under the provisions of this act."

This court has uniformly held that where the sale of liquor was prohibited by a special act of the General Assembly prohibiting the sale in a special locality, that the local law remains in full force until repealed, or until the sale of liquor is permitted by an election held under the general Local Option Law. In construing the effect of the general Local Option Law in territory where by a special act of the Legislature the sale of spirituous liquors is prohibited, this court has uniformly held that the special law and the general Local Option Law should be construed together, and that the general law should control as to methods of procedure and the penalties to be assessed for the violation of the special law; but it has been as uniformly held that the special law prohibiting the sale of spirituous liquors within a specially designated territory can be rendered inoperative and repealed in the manner provided in the general Local Option Law for taking the sense of the people in said territory relating to whether or not they desire or do not desire the sale of liquor within such designated territory. (*Stamper v. Commonwealth of Ky.*, 102 Ky., 33, 42 S. W., 915; *Brann v. Hart*, 97 Ky., 735, 31 S. W., 467; *Ed-*

monson v. Commonwealth of Ky., 110 Ky., 510, 62 S. W., 1018; Thompson v. Commonwealth of Ky., 103 Ky., 685, 45 S. W., 1039.)

In the case of Brann v. Hart, *supra*, the court said: "For the manner in which such an existing statute may be repealed or nullified as well as the manner in which sale of spirituous, vinous, or malt liquors may be hereafter prohibited in any city, town, county, district, or precinct is expressly provided for in Chapter 81, Kentucky Statutes, title of which is Local Option Law, which was intended to, and does, regulate the whole subject as provided for in Section 61 of the Constitution."

There is no doubt that the Local Option Law was in force in all of Pike county, Kentucky, including the Blackberry precinct from March 10, 1884, until the year 1901. At the August term, 1901, of the Pike County Court a petition was filed signed by 25 per cent of the voters who cast their votes at the last preceding general election in said precinct, asking that an election be held in said precinct on the 7th day of December, 1901, for the purpose of taking the sense of the legal voters of said precinct as to "whether or not the Local Option Law, which then existed in said precinct, should be repealed, and whether or not spirituous, vinous, and malt liquors might be sold in the said precinct." Thereafter, in conformity to the provisions of Chapter 81 of the Kentucky Statutes, an order was made by said court directing such an election to be held by the proper officer in said precinct, and thereafter said election was held on the 7th day of December, 1901, and the returns from said election were duly canvassed and certified by the Election Commissioners of Pike county, and it appears that at said election that 87 votes were cast in favor of the sale of spirituous liquors being authorized in said precinct, and 12 votes were cast against said sale. This result repealed the prohibitory laws regulating the sale of liquor so far as it applied to the Blackberry precinct of said county. From the foregoing it appears that the circuit court was in error when it held that the Local Option Law was still in force in the Blackberry precinct of Pike county, and that the appellant was guilty of a violation of said law.

It is, therefore, ordered that said judgment of conviction be reversed, and this case be remanded to the court below with directions for proceedings consistent with this opinion.



**Drury v. Commonwealth.**

(Decided January 13, 1915.)

## Appeal from Daviess Circuit Court.

1. **Indictment—Indictment Under Section 1164, Kentucky Statutes.**—An indictment under Section 1164 of the Kentucky Statutes, which charges in both the accusatory and in the descriptive portions of the indictment, that the accused “feloniously broke and entered a store-house and did feloniously take and steal therefrom articles of value, the property of another person,” does not charge but one offense, and is not vitiated for duplicity.
2. **Intoxicating Liquors—Retail Liquor House.**—A “retail liquor house” wherein a saloon is conducted is a store-house within the meaning of Section 1164, Kentucky Statutes.
3. **Indictment.**—An indictment which, in the accusatory part of it, charged the accused with the offense of feloniously breaking and entering into a house of another with intent to steal therefrom, and in the descriptive portion of the indictment alleged that the offense was committed by feloniously breaking and entering into a retail liquor house, wherein a saloon was conducted, with felonious intent to steal therefrom articles of value, is an indictment for violation of Section 1164 of the Kentucky Statutes, and is sufficient upon demurrer, being certain as to the offense charged.
4. **Indictment—To Determine Certainty of Offense Charged.**—In determining whether an indictment for a statutory offense is direct and certain as to the offense charged, the court will look to the entire indictment.

FLOYD J. LASWELL for appellant.

JAMES GARNETT, Attorney General, C. H. MORRIS, Assistant Attorney General, for appellee.

## OPINION OF THE COURT BY JUDGE HURT—Affirming.

Under the following indictment the appellant, Will Drury, was indicted and found guilty and sentenced to confinement in the penitentiary for an indeterminate sentence from one to five years, namely:

“The Grand Jurors of Daviess County, in the name and by the authority of the Commonwealth of Kentucky, accuse Will Drury of the crime of wilfully, unlawfully, and feloniously breaking and entering into a house of another with intent to steal therefrom, and unlawfully and feloniously taking and stealing and carrying away therefrom articles of value, the property of another, committed in manner and form as follows, to-wit:

"The said Will Drury, in the said County of Daviess, on the — day of February, 1914, and before March 17, 1914, and before the finding of this indictment, with force and arms, wilfully, unlawfully, and feloniously did break and enter into a retail liquor house, same being the house in which Drury & Sandefur conduct a saloon, with the felonious intent to take, steal, and carry away therefrom articles of value, and did then and there wilfully, unlawfully, and feloniously take, steal, and carry away therefrom personal property of the value of \$—, the property of Drury & Sandefur, with the fraudulent intent then and there to convert same to his own use, and to permanently deprive the owners of said property, of their property rights therein, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

The appellant was twice put upon trial under this indictment, the first trial resulting in a disagreement of the jury, and the last trial in his conviction as aforesaid. The appellant upon his trial entered a general demurrer to the indictment, which was overruled, and he also, upon the conclusion of all of the evidence in the case, moved the court to peremptorily instruct the jury to find him not guilty, which was also overruled.

The appellant filed grounds for a new trial, and moved the court to set aside the verdict of the jury, which motion was overruled, and he appeals to this court.

The objection urged to the indictment is that it charges the appellant with the commission of two offenses. If this objection were true it would be fatal to the indictment. It is insisted for him that the indictment charges him with a crime denounced by Section 1162 of the Kentucky Statutes and also a crime denounced by Section 1164 of said statutes. The trial court was of the opinion that it was an indictment under Section 1164, and in this opinion we concur. In the case of *Farris v. Commonwealth of Kentucky* (90 Ky., 637), the indictment charged the accused with the offense of not only breaking into a store house with the intent to steal, but also averred that the accused did take, steal and carry away from said store house things of value. The objection was made in that case that the indictment described two offenses with which it charged the accused. This court, however, held in that case that said indict-

ment charged him with only one offense. The court in the case, *supra*, used this language:

"The gravamen of the offense denounced by the statute is the breaking into the store house with a felonious purpose. This being so, the indictment may properly charge not only that the breaking was with the intent to steal, but that the party did steal property therefrom. The stealing shows the intent of the breaking into the house. It is the very best evidence of it, and if it can be proved under an averment of a breaking with intent to steal, we fail to see why it cannot be charged in the indictment without rendering it liable to the charge of duplicity."

In the same case the court further said: "The words of the statute, 'with intent to steal or shall feloniously take therefrom,' relate to the offense of breaking the store house merely, and both the intent and the stealing evidencing it may therefore be charged in an indictment under the statute."

In the case of *Olive v. Commonwealth of Kentucky* (5 Bush, 376), where the indictment was for burglary, instead of averring that the breaking was done with the intent to commit a felony by stealing, it went further and alleged that the accused actually did steal from the house, which he was charged with breaking, and the court in that case held that that additional allegation did not vitiate the indictment. This court, in considering that case, said: "In this case more is charged in the indictment than was necessary, and the attorney for the State, instead of stating the intent, has alleged the actual commission of the ulterior felony in the house broken and entered, as a substitute for the usual averment of the intent to commit the particular felony, which certainly did not vitiate the indictment; for the commission of the felony is the very best evidence of the intent to commit it, and this accords with the general doctrine on the question." While in this case it would be sufficient in the accusative part of the indictment to charge that the defendant feloniously broke into the store house with the intent to steal therefrom, the additional allegation that he did feloniously steal therefrom articles of value, does not create any duplicity in the indictment and does not vitiate it. Neither do the allegations in the descriptive portion of the indictment, which charge that the accused did feloniously take, steal, and carry away articles of value from said saloon, giving the name

of the owner of the property, create any duplicity in the indictment or vitiate it. While an indictment under Section 1162 of the Kentucky Statutes, charging the feloniously breaking and entering of a dwelling house, it would be necessary to allege that the accused, in addition to the intent to steal, with which he broke and entered the dwelling house, did actually steal and take therefrom articles of value, but under Section 1164, under an indictment for the breaking and entering a store house with the intent to steal, it would be unnecessary to allege that the accused did actually steal and carry away things, but such allegations would only be surplusage, and would not vitiate the indictment.

Another objection alleged to the indictment is that in the accusatory part of the indictment the appellant is accused of the crime of "wilfully, unlawfully and feloniously breaking and entering into a *house* of another, with intent to steal therefrom and did unlawfully take, steal and carry away therefrom articles of value, the property of another," and it is insisted that this is a charge of being guilty of an offense against Section 1162 of the statutes, and not an offense under Section 1164 of said statutes, while the descriptive portion of said indictment describes an offense against Section 1164 of said statutes. A reference to Section 1162 shows that no such an offense is described in said section, as of feloniously breaking or entering into a *house* or feloniously taking away anything of value; it is only by breaking and entering into a dwelling house whereby said section may be violated. While it is true that in Section 1164 there is no crime denounced against any breaking into a house, except it be a warehouse or store house, but taking the indictment as a whole, it comes up fully to all of the requirements of Section 124 of the Criminal Code, which provides that the indictment must be direct and certain as regards the party charged, the offense charged, the county in which the offense was committed, and the particular circumstances of the offense charged. The descriptive portion of the indictment contains the allegation that the breaking and entering mentioned in the accusative portion of the indictment was into a "retail liquor house, the same being the house in which Drury & Sandefur conducted a saloon." While the provisions of Section 124 of the Criminal Code provides that the indictment shall be direct and certain in the four particulars mentioned, it does not require that they shall

be contained in the accusatory part of the indictment alone.

In the case of Commonwealth of Kentucky v. Drewry (126 Ky., 183), this language was used by the court: "It is to the descriptive part of the indictment that we look for information concerning the offense charged; hence it is necessary that more care should be used in describing the offense in the body of the indictment than in the accusatory part."

In the case of Commonwealth of Kentucky v. Schatzman (118 Ky., 624), this court said: "The rule is that where the indictment is for a statutory offense, it is sufficient, if, in the accusative part, the offense is designated, being a brief general description in the language of the statute, sufficient to apprise a person of ordinary understanding with what is meant."

In the case of Overstreet v. Commonwealth of Kentucky (147 Ky., 471) the accusative part of the indictment charged the accused with the crime of arson, and in the descriptive portion of the indictment, in describing the offense committed, alleged that it was committed by burning a store house. It was held in that case that the indictment was sufficient upon which to sustain the conviction for the crime of burning a store house, denounced by Section 1169 of the Kentucky Statutes. The court, in its opinion in that case, used the following language: "Nor will any difference between the accusative part of the indictment and the body or the descriptive part of it, that is not so substantial as to be misleading, be fatal to the sufficiency of the pleading. In other words, in considering the sufficiency of an indictment it will be read and considered as a whole. If, when so read and considered, it substantially conforms to the requirements of the code in respect to the matters therein pointed out as material and necessary, it will be a good indictment."

The fact that the indictment in this case in the accusative part of it uses the word *house* instead of *store house* does not make it bad, as the other things stated in the indictment, when it is taken as a whole, describe the house broken into as a retail liquor house, and in which a saloon was then conducted by parties whose names are given, makes the offense charged in the indictment direct and certain, and all of the indictment taken together contains allegations which are sufficient to advise

a person of ordinary understanding of the complete nature of the offense charged against him.

A retail liquor house, in which a saloon is conducted, is a store house, within the meaning of Section 1164 of the Kentucky Statutes. For these reasons the trial court did not err in overruling the appellant's general demurrer to the indictment.

The appellant, however, seriously insists that there is no evidence conducing to show that the saloon of Drury & Sandefur was broken and entered, as alleged in the indictment, and in support of his contention cites cases of *Little v. Commonwealth of Kentucky* (151 Ky., 520); *Smith v. Commonwealth of Ky.* (128 S. W., 68); and *Webb v. Commonwealth of Kentucky* (87 Ky., 129). These cases, however, do not seem to bear out the contentions of the counsel for the appellant.

In the case of *Webb v. Commonwealth of Kentucky*, *supra*, the indictment failed to charge any breaking whatever into any house, and in the other two cases cited there was no evidence conducing to show that any breaking had occurred, which is the gravamen of the offense. In the case at bar, however, the proof very abundantly shows that the house in question was both broken and entered into. It is proven, and not contradicted, that a wire screen, which was nailed over a window in the building, was torn away sufficiently so as to admit the body of a person desiring to enter, and a back door, which was fastened with a prop, and also with a lock, was broken open, and was standing open several inches when Sandefur, who had last closed up his saloon, returned to it about two o'clock in the afternoon. It was also proven, and not contradicted, that eight quart bottles containing Hill & Hill whisky and a half of a case of Gold Blume beer, twenty bottles, had been taken from the saloon, which shows very conclusively that the saloon had been broken and entered into with the intent to steal by some one.

As to the instructions given to the jury by the court, the counsel for appellant does not find any fault with them, and we observe none.

The two grounds urged by the appellant for the reversal of this case, because the court did not instruct the jury to find him not guilty, and because there was not sufficient evidence to authorize the jury to find him guilty, and to sustain the verdict of the jury, we will consider together, and a short statement of the evidence will be

necessary for that consideration. The proof conduces to show the following facts: That Drury & Sandefur conducted a saloon in Owensboro, Kentucky, in a house in which was kept whisky and beer for sale, and that on a Sunday, and the same day that there were some bicycle races took place upon the river front, at Owensboro, the appellant had just arrived in the town from some point, and was around and about the saloon of Drury & Sandefur near eleven o'clock, A. M., when Sandefur closed and locked up his saloon and went away, and did not return until about two o'clock in the afternoon, when he discovered the evidences of the saloon having been broken and entered and the goods stolen, as above stated. While it is true that no one saw appellant break or enter the saloon, but between about half after eleven and twelve o'clock of the same day, and directly after Sandefur had left the saloon, the appellant was seen with Hill & Hill whisky, contained in bottles so labeled and the same character of bottles as had been taken from the saloon on that day. There was further evidence by several other witnesses that on that day, and after eleven o'clock A. M., the appellant was seen in possession of bottles of Hill & Hill whisky, and also of Gold Blume beer. The appellant had lived in Owensboro previous to that time, and was well acquainted in the town, and in his testimony he accounted for the possession of the Hill & Hill whisky by stating that he had bought the whisky from Sandefur in his saloon on that day, and denied having any beer in his possession on that day. He claimed that he bought the whisky, which was in his possession on that day from Sandefur, in his saloon, in the presence of his brother and two other witnesses, neither of whom he had caused to be subpoenaed to testify for him, although this was his second trial of this case, and said witnesses were then in Owensboro. Sandefur denied selling any whisky or beer to appellant on that day, and appellant made no other contention as to how he had come into possession of the whisky, except by a purchase from Sandefur. The evidence was sufficient to authorize the court to submit the question of the guilt of appellant to the jury. The jury was properly instructed, and was the judge of the credibility of the witnesses. We cannot say that the evidence was insufficient to authorize the verdict. It seems that appellant had a fair trial, and no error to the prejudice of his substantial rights was committed, and the judgment of the circuit court is, therefore, affirmed.

**Palmer's Administratrix v. Empire Coal Company.**

(Decided January 13, 1914.)

**Appeal from Christian Circuit Court.**

1. **Negligence—Pleading.**—While negligence may be pleaded in general terms, yet where plaintiff specifies the negligence on which he relies, his recovery is limited to such negligence.
2. **Trial—Pleading.**—It is error either to hear evidence or submit a case on a cause of action or defense not relied on in the pleadings.
3. **Pleading—Evidence—Trial.**—In an action for damages for the death of a coal miner caused by falling slate, under an allegation of the failure of the defendant itself to prop the roof where decedent was working, and of its failure to furnish decedent a reasonably safe place to work, evidence of defendant's failure to furnish decedent sufficient props and caps to support the roof was not admissible; and where this issue was submitted to the jury, the trial court properly granted a new trial.
4. **Mines—Provisions of Statute—May Not Be Changed by Custom.**—The provisions of the statute relating to mines may not be changed by custom so as to impose on the mine owner liability by reason of such custom, when, as a matter of fact, the statute itself is not complied with.
5. **Customs and Usages—Repugnancy to Statutes.**—A custom or usage contrary to the express provisions of a statute is void; and where there is a conflict between the custom or usage and a statutory regulation, the statutory regulation must control.
6. **Master and Servant—Mines—Injury to Miner—Failure of Miner to Comply with Provisions of Statute—Custom of Mine.**—Where a miner failed to comply with the provisions of the statute in selecting and marking props, his administratrix cannot recover damages for his death, caused by falling slate, on the theory that the custom of the mine did not require him to select and mark the props.

DOUGLAS BELL and TRIMBLE & BELL for appellant.

GORDON, GORDON & COX for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

The Empire Coal & Coke Company, a Delaware corporation, owns certain mines at Empire, Kentucky, which are leased by the Empire Coal Company, a Tennessee corporation. Isom Palmer, a miner in the employ of the Empire Coal Company, was killed by falling slate. His administratrix brought this action to recover damages



for his death. On the first trial the jury returned a verdict in favor of plaintiff against the Empire Coal Company for \$1,250. A peremptory instruction was given in favor of the Empire Coal & Coke Company. Subsequently a new trial was granted. On the second trial the court directed a verdict in favor of the Empire Coal Company. Plaintiff appeals.

It is insisted that a new trial was improperly granted and that the case should be remanded with directions to enter judgment on the verdict for \$1,250, rendered at the first trial. It is also insisted that the court erred in directing a verdict in favor of the defendant on the last trial.

In her original petition plaintiff based her right to recover on gross carelessness and negligence of the defendants in failing to properly support and prop up the roof of the mine at the place where plaintiff's decedent was engaged at work. Subsequently plaintiff amended her petition and based her right to recover on the failure of defendants to furnish her decedent a reasonably safe place to work.

It developed on the first trial that the decedent had been employed in the mine for a period of about 26 years, and was a miner of skill and experience. He was engaged in shooting and picking down the coal and loading it on cars. It was his duty to prop the roof with timber or props furnished him by the defendant. During the progress of the case the trial court permitted plaintiff to prove, over the objection of the defendant, that the decedent had requested the foreman of the mine to furnish him props and the foreman had promised, but failed to do so.

The only ground on which the case was submitted to the jury was the failure of the defendant to furnish decedent at his working place a sufficient number of caps and props to keep the roof secure, though this ground of recovery was not relied on in either the original or the amended petition.

After the new trial was granted, plaintiff filed a second amended petition, pleading, in substance, a failure on the part of the defendant, the Empire Coal Company, to furnish decedent a sufficient number of props and caps to properly protect and support the roof of his working place, although decedent had selected and marked a sufficient number of props and caps for that purpose.

On the second trial plaintiff showed that her decedent had requested props, and that the mine foreman had promised to furnish them. Plaintiff failed to show that the decedent had selected and marked any props. To overcome the effect of this failure on his part plaintiff sought to show that under the custom of the mine in question it was not the duty of the miner to select and mark his props, but merely to request the foreman to furnish props, which he would always do upon request.

Section 2739b, Kentucky Statutes, provides as follows:

“Caps and Props to be Supplied to Miners. Each owner, lessee or operator of every mine to which the mining laws of the State apply, shall provide and furnish to the miners employed in said mine a sufficient number of caps and props, said props to be sawed square at each end, to be used by said miners in securing the roof in their rooms, and at such other working places where by law or custom of those usually engaged in such employment it is the duty of said miners to keep the roof propped, after the miner has selected and worked the same.”

(1) As before stated, the only grounds for negligence relied on in the original and first amended petition were the failure of the defendant to prop the roof of decedent's working place and its failure to furnish him a reasonably safe place to work. While it is well settled that negligence may be pleaded in general terms, yet it is equally well settled that where the plaintiff specifies the negligence on which he relies, his recovery is limited to such negligence. *Gaines v. Johnson*, 133 Ky., 507, 105 S. W., 381; *Lexington R. Co. v. Britton*, 130 Ky., 676, 114 S. W., 295. This is not a case where evidence on an issue not made by the pleadings was heard without objection, and the case submitted to the jury on that issue. It is a case where defendant, in every possible way, objected to the introduction of evidence tending to show that it failed to furnish props, the objections being based on the ground that no such issue was presented by the pleadings. It has been ruled that a recovery cannot be had for defective appliances under an averment that the premises were unsafe. It has also been held that where the petition charges a failure to furnish reasonably safe appliances, a recovery cannot be had for a failure to warn or instruct. *Gaines v. John-*

son, *supra*. Under an allegation of a failure to furnish reasonably safe appliances and a reasonably safe place to work a recovery cannot be had for a failure to keep a promise to repair. *Burch v. Louisville Car Wheel & Ry. Supply Co.*, 146 Ky., 272, 142 S. W., 414. Indeed, it is the general rule that it is error either to hear evidence or submit a case on a cause of action or defense not relied on in the pleadings. *Kearney v. City of Covington*, 1 Metc., 339. The reason for the rule is that the parties have the right to look to and be governed by the pleadings in preparing the case, and are not required to anticipate that during the trial issues distinct from those relied on will be asserted. We, therefore, conclude that under an allegation of the failure of the defendant itself to prop the roof where decedent was working, and of its failure to furnish decedent a reasonably safe place to work, evidence of defendant's failure to furnish decedent sufficient props and caps to support the roof was not admissible, and for the same reason this issue should not have been submitted to the jury. It follows, therefore, that the trial court did not err in granting defendant a new trial.

(2) In her second amended petition plaintiff based her case solely on a violation by defendant of the provisions of Section 2739b, Kentucky Statutes, above set out. We think it perfectly clear that the word "worked" in the concluding sentence of the above section is a clerical error, and should be "marked." *Old Diamond Coal Co. v. Denney*, 160 Ky., 554. It is equally clear that the words "the same" refer to caps and props. A miner is in a position to know what character of props he needs. The purpose of marking them is to indicate where they should be taken. As before stated, plaintiff did not show that the decedent had selected and marked any props. In other words, he did not comply with the provisions of the statute. The question, then, is: May the provisions of the statute be changed by custom and liability imposed on the mine owner by reason of such custom, when, as a matter of fact, the statute itself is not complied with? Here it is sought to recover under a statute by pleading a custom inconsistent therewith. Were we to uphold plaintiff's contention, every case like this would depend, not on the statute which the legislature saw fit to enact, but on the custom of the particular mine, and the rules of law applicable would vary according to the particular cir-

cumstances of each case. The very purpose of the statute was to do away with this uncertain condition, and prescribe with reasonable certainty the duties and liabilities of the miner and mine owner. It is a general rule of law that a custom or usage contrary to the express provisions of a statute is void, and when there is a conflict between the custom or usage and a statutory regulation, the statutory regulation must control. 12 Cyc., 1054. While the duties and liabilities of the miner and of the mine owner may sometimes depend upon the custom of the mine, where there is no statute covering the subject (*Old Diamond Coal Co. v. Denney, supra*), we take it that where a statute speaks on the subject the terms of the statute cannot be modified by custom. *Consolidated Coal & Mining Co. v. Floyd*, 25 L. R. A., 848, 38 N. E., 310. If the rule were otherwise, it should be applied not only in favor of the miner, but in favor of the mine owner. Suppose, under the custom of a particular mine, it was the duty of the miner to furnish props and caps, could it be reasonably contended that such a custom would relieve the mine owner from his statutory duty? We think not. For the same reason the miner himself should not be relieved by custom from his statutory duty. The only safe way is to have a uniform rule on the subject and to hold that in every case where the statute speaks it alone should control, and not the varying and changing custom of each particular mine. Since the statute imposes upon the mine owner the duty of furnishing caps and props only after the miner has selected and marked the same, and as there was no evidence tending to show that the decedent selected and marked any props, and as any custom of the mine contrary to the provisions of the statute is void, it follows that the trial court properly directed a verdict in favor of the defendant.

Judgment affirmed.

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### Ockerman v. Woodward.

(Decided January 13, 1915.)

Appeal from Nelson Circuit Court.

1. **Appeal.**—An appeal is taken within the meaning of the statute when it is granted by the Circuit Court; the date of filing the

record in the office of the Clerk of the Court of Appeals does not control.

2. **Appeal—Dismissal.**—Where an appeal was granted by the Circuit Court on June 9th, 1914 from a judgment dismissing a petition for \$475.00 damages, and the record was filed in this court on December 14, 1914, the appeal is controlled by the Act of 1898, and will not be dismissed for want of jurisdiction.

ERNEST N. FULTON, G. S. & J. A. FULTON for appellant.

KELLEY & KELLEY and REDFORD C. CHERRY for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Overruling motion to dismiss appeal.

Ockerman sued the appellee for \$475.00 damages; his petition was dismissed on June 5, 1914. The order of June 9, 1914, overruling Ockerman's motion for a new trial, granted him an appeal to this court. Ockerman filed his record in the office of the clerk of this court on December 14, 1914, whereupon appellee moved this court to dismiss the appeal for want of jurisdiction.

Under the Act of March 14, 1898, the minimum jurisdiction of this court, in cases of this character, was fixed at \$200.00; and it so remained until the Act of March 17, 1914, fixed said minimum jurisdiction at \$500.00, with the right in this court to grant an appeal in certain cases, specified in the act, wherein the recovery was as much as \$200.00, exclusive of interest and costs. Acts 1914, p. 94. Upon filing his record in this court appellant, out of abundant caution, entered a motion in this court for an appeal, as provided by Section 3 of the Act of 1914.

The motion to dismiss the appeal is based upon the idea that the appeal is controlled by the Act of 1914, because the record was filed in the office of the clerk of this court on December 14, 1914, after the Act of March 17, 1914, became effective, and that the appeal has been granted by this court. Neither fact, however, is true. The appeal was taken within the meaning of the statute when it was granted by the circuit court. *Terry v. Johnson*, 105 Ky., 760; *Frost v. Rowan*, 21 Ky. L. R., 1777, 56 S. W., 427; *Alexander v. Warner*, 22 Ky. L. R., 720, 58 S. W., 700; *Hill v. Booth*, 22 Ky. L. R., 840, 58 S. W., 993.

Under Section 55 of the Constitution, the Act of March 17, 1914, did not become effective until ninety days after that date; and, as the appeal was granted by the

circuit court on June 9th, 1914, before the Act of March 17, 1914, became effective, it is to be controlled by the Act of 1898, which was then in force.

The appeal is here as a matter of right; and the fact that appellant, out of abundant caution, moved this court for an appeal under the Act of 1914, cannot affect appellant's rights under the original appeal granted in the circuit court, which has never been abandoned and was prosecuted within the time prescribed by the Code.

Motion to dismiss appeal overruled.

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### **Cincinnati, New Orleans & Texas Pacific Railway Company v. Veatch.**

(Decided January 14, 1915.)

#### **Appeal from Mercer Circuit Court.**

1. **Carriers—Carriers of Live Stock—Actions—Pleading.**—Where live stock is delivered to a carrier for transportation in good condition, and the carrier fails to deliver it at destination in like condition, the carrier is liable unless the loss or injury was caused by the act of God or the public enemy, the inherent nature and qualities of the animals themselves, or the act or fault of the shipper. Hence it is unnecessary to allege that the loss or injury was due to the carrier's negligent act; and an allegation of negligence is mere surplusage.
2. **Trial—Taking Case or Question From Jury—Inferences From Evidence.**—It is the peculiar province of the jury to draw inferences from proven facts.
3. **Appeal—Determination and Disposition of—Reversal—Amount or Extent of Recovery.**—A judgment will not be reversed for a trivial excess in the amount thereof.

E. H. GAITHER for appellant.

C. E. RANKIN for appellee.

#### **OPINION OF THE COURT BY JUDGE HANNAH—Affirming.**

J. T. Veatch delivered to the Cincinnati, New Orleans & Texas Pacific Railway Company, at Somerset, on December 5, 1912, nine hogs, one bull, twenty-nine head of cows, and four calves, which shipment was accepted by the carrier, and a contract entered into for its delivery at Cincinnati.

On April 24, 1913, Veatch sued the railway company in the Mercer Circuit Court to recover damages for injuries to the live stock so shipped, and, upon a trial, there was a verdict and judgment for \$266.00. The railway company appeals.

1. It was alleged in the petition that the cattle were injured in a wreck; and appellant contends that having pleaded that the cattle were so injured, and having failed to prove the charge, the plaintiff was not entitled to a recovery

The well-settled Kentucky rule is that where a shipment of live stock is accompanied by the owner or his agent, and injury results during transit, the burden is upon the owner to show how the injury occurred, i. e., whether it was caused by some actionable negligence upon the part of the carrier; but where the live stock is not accompanied by the owner or his agent, and injury results during transit, then, when the owner shows that the live stock was in good condition when delivered to and accepted by the carrier for shipment, and was in a damaged or injured condition when delivered by the carrier to the consignee at the place of destination, the burden shifts; and unless the carrier can show that the injury was due to the inherent nature, propensities or viciousness of the animals, or other relieving cause, the carrier is liable for such injury. *I. C. R. R. v. Word*, 149 Ky., 229; *McC Campbell, &c. v. L. & N.*, 150 Ky., 723; 150 S. W., 987; *L. & N. v. McClin-tock*, 151 Ky., 455, 152 S. W., 253; *I. C. R. R. v. Howard*, 152 Ky., 308, 153 S. W., 427; *L. & N. v. Cecil*, 155 Ky., 170, 159 S. W., 689; *C., N. O. & T. P. v. Smith*, 155 Ky., 481, 159 S. W., 987.

Under this rule, as plaintiff did not accompany the shipment, it was sufficient for the plaintiff to allege and prove the delivery to and acceptance by the carrier of the live stock in good condition; and that the carrier failed to deliver the same at destination in like condition. It then devolves upon the carrier to show that the injuries were due to the act of God or the public enemy, or to the inherent nature and qualities of the live stock, or to the act or fault of the shipper himself. Unless the carrier can show this, it is liable for loss or injury regardless of whether it was negligent or not. It was therefore surplusage for the plaintiff to allege

in his petition any negligence upon the part of the carrier. *L. H. & St. L. v. S. S. H. & C. Co.*, 157 Ky., 772.

2. It was shown in evidence for the defendant company that the bull and the nine hogs were loaded in one compartment of a stock car, the bull being tied; and the cows and calves loaded in another compartment of the car. That they were loaded a short time before 3:15 P. M., the hour at which the train was due by which the car was expected to be moved. That on the day in question, however, the train was delayed, and that between four and five o'clock section men working in the vicinity discovered a commotion among the cattle in the car. That, upon investigation, it was disclosed that one of the cows was fighting the others, and that the non-combatants were huddled together in one end of the car. That the men got the cattle quieted down and left them. That none of them at that time had been injured apparently, except that one of the calves was down. That shortly after five o'clock the yard foreman, hearing a tumult in the car, notified the railroad agent, and they went together to the car. That they found the militant cow still fighting, and the remainder of the cows huddled and entangled and piled together in the end of the car. That the crew of section men was sent for, and the cattle unloaded from the car. That seven cows and three calves were either dead or so badly injured that it was necessary to kill them. The remainder of the shipment was forwarded to destination; but one of the cows so forwarded was crippled, and brought only four dollars when sold.

It is contended by appellant that it proved that the injuries to the animals were due to the inherent nature and propensities thereof, and that it thereby absolved itself from legal liability, and was entitled to a directed verdict at the close of its evidence.

But appellant errs in stating the effect and extent of the evidence introduced by it. It was not directly proven that the ten dead animals were killed by the militant cow. It was proven that one of the cows had mobilized and was on the warpath; and it was proven that there were found in the car ten dead animals; but it was not directly proven that the militant cow killed them, or exactly how they were killed.

It must be conceded that the evidence for the railway company was sufficient to raise a strong inference



of fact that the dead cattle were killed by reason of the attacks of the enraged cow. However, it is in evidence that the dead cattle were skinned and there were on their hides no indications that any of them were gored to death, and their death may have resulted in some other manner.

Where a fact is sought to be established by indirect evidence, it is the peculiar province of the jury to draw inferences from the facts proven; and where more than one inference may reasonably be drawn, or where a certain inference may reasonably be drawn or declined to be drawn, the matter is for the jury. It is only when all the circumstances taken together inevitably point to and afford but one reasonable explanation, that such evidence may be taken as conclusively raising an inference of the fact sought to be established thereby. So, whether the railway company showed that the injuries to the animals were caused by the militant cow, and thereby absolved itself from legal liability, was for the jury. *Adams v. Tiernan*, 5 Dana, 394; *Dolfinger & Co. v. Fishback*, 12 Bush, 474; *Cent. Coal & Iron Co. v. Owens*, 142 Ky., 19, 133 S. W., 966; *Bergman v. Solomon*, 143 Ky., 581, 136 S. W., 1010; 38 Cyc., 1517.

Plaintiff introduced evidence showing that none of the cows were vicious, and the jury doubtless believed that seven cows and three calves were a few too many cattle for one cow to kill in so short a time without using her horns, and therefore doubted the inference thus raised by defendant's evidence, and it was the province of the jury to weigh the evidence.

3. It is insisted that the verdict is excessive.

Defendant's evidence shows that of the cattle killed seven were cows and three were calves and there was one cow crippled that sold for \$4. The bill of lading stipulated for a valuation of not exceeding \$30 on the cows and \$5 on the calves shipped. At this rate, according to defendant's evidence, the verdict should have been for only \$251. But plaintiff contends that the witnesses on both sides used the words "cows" and "calves" indiscriminately and that the jury could have found that all the missing cattle were cows, and thus finding could have allowed a greater sum than they did.

However, it has been many times held that a judgment will not be reversed for a trivial excess in the amount thereof, where the cost of another trial would

exceed the reduction to which appellant would be entitled. *Smoot v. Wainscott*, 28 R., 233, 80 S. W., 176; *Gates v. Davis*, 28 R., 490, 89 S. W., 490; *Nickels v. Frankfort*, 33 R., 918, 111 S. W., 706; *Gambrell v. Gambrell*, 130 Ky., 174, 113 S. W., 885; *Kelly v. Adams Express Co.*, 134 Ky., 208, 119 S. W., 747; *Rector v. Rector*, 137 Ky., 76, 122 S. W., 518; *City of Columbus v. Bank of Columbus*, 122 S. W., 835; *Petersburg Coal Co. v. Bishop*, 157 Ky., 219, 152 S. W., 817.

Judgment affirmed.

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### **Commonwealth Land & Lumber Company v. Smith.**

(Decided January 14, 1915.)

#### **Appeal from Harlan Circuit Court.**

**Process—Requisites and Validity of Warning Order.**—Although Section 57 of the Civil Code permits a corporation having no agent in the State known to plaintiff to be proceeded against by warning order, yet in view of Section 571, Kentucky Statutes, requiring all corporations to designate a process agent and to keep an office in this State wherein a process agent may be found, the plaintiff may not use his ignorance as a refuge and shut his eyes to the truth, and refrain from inquiring of the Secretary of State whether the corporation has designated a process agent, and in good faith, make affidavit that the corporation has no agent in the State known to him.

ACREE & STEWART, HAZELRIGG & HAZELRIGG, T. G. STUART and HELM BRUCE for appellant.

H. C. CLAY and J. S. FORESTER for appellee.

#### **OPINION OF THE COURT BY JUDGE HANNAH—Reversing.**

On June 7, 1911, the Commonwealth of Kentucky, by J. G. Forrester, Commonwealth's Attorney for the Twenty-sixth Judicial District, instituted an action in equity in the Harlan Circuit Court against the Commonwealth Land & Lumber Company and others, under the authority of Section 4076d, Kentucky Statutes, for the purpose of declaring a forfeiture of the title to certain lands in Harlan county for non-payment of taxes.

It was alleged in the petition that the defendant, Commonwealth Land & Lumber Company, was a corporation organized and existing under and by virtue of

the laws of Kentucky, and that said company was the owner and claimant of the land, the title to which was sought to be forfeited.

At the time of the institution of the action, the Commonwealth's Attorney made an affidavit for a warning order, and the defendant Commonwealth Land & Lumber Company was proceeded against by constructive service of process. A warning order attorney was appointed, and a copy of the petition was posted at the front door of the courthouse.

In due time, the cause came on for trial, and on November 1, 1911, there was a verdict upon which the court rendered a judgment of forfeiture, and ordered a sale of the lands in question on April 13, 1912. The sale was had on September 2, 1912, and C. C. Smith became the purchaser of the lands, which comprise five hundred acres, at the price of two hundred and fifty dollars. On September 11, 1912, the sale was confirmed, and a deed was executed to the purchaser.

On December 13, 1913, the Commonwealth Land & Lumber Company and W. L. Bramblett, administrator of the estate of G. W. Bramblett, instituted this proceeding in equity in the Harlan Circuit Court to invalidate the forfeiture proceedings and the deed thereunder executed to the purchaser, C. C. Smith. A demurrer to the petition was sustained, and the sufficiency of the petition is sought to be upheld upon this appeal.

Bramblett's administrator is made a party plaintiff for the reason that at the time the forfeiture proceeding was instituted and the judgment was rendered and sale had, Bramblett had an attachment lien upon the lands in question; and since the deed was executed to C. C. Smith, the lands have been conveyed to him by the Commonwealth Land & Lumber Company.

1. The principal and only question presented upon the appeal is whether the defendant, Commonwealth Land & Lumber Company, was properly before the court in the forfeiture suit.

The statute (4076d) contains this language: "In addition to the requirements of the Civil Code of Practice respecting process and service thereof, notice shall be given of the pendency of the action by posting a copy of the petition at the front door of the courthouse, which shall be done by the clerk immediately after the petition

is filed; and he shall show by endorsements upon the original petition the time at which said copy was posted. And such copy, when so posted, shall be deemed notice to all defendants of the pendency of said action and its object."

By virtue of the last sentence of the quotation, it is contended by appellee that the posting of a copy of the petition was sufficient to confer jurisdiction to render the judgment herein sought to be invalidated.

But the statute must be construed as a whole, and it specifically says that the language quoted is in addition to the requirements of the Civil Code respecting process and service thereof. And, as among its provisions is one by which the unknown owners and claimants of lands may be proceeded against and a forfeiture of their lands declared, we think it was to this class of defendants that the latter sentence of the language quoted was directed.

Where known defendants are proceeded against, it is undoubtedly necessary that the requirements of the Civil Code in respect of process and the service thereof shall be observed. The question here is whether there has been a proper observance of those provisions.

As has been said, the petition alleged that the Commonwealth Land & Lumber Company was a Kentucky corporation. Section 571, Kentucky Statutes, requires all corporations (except foreign insurance companies) doing business in this State to have at all times one or more known places of business in this State, and an authorized agent thereat upon whom process may be served; also to designate by a statement filed in the office of the Secretary of State, an agent for the service of process, which agent, when so designated, shall remain agent for that purpose until the statement of the appointment of another agent is therein filed.

The affidavit made by the Commonwealth's Attorney which was filed with the petition for the purpose of proceeding against the defendant corporation by constructive service of process, states that the defendant corporation had no agent in the State known to him. But it does not aver that the affiant had made any inquiries for the purpose of ascertaining the whereabouts of any agents of the corporation, or that he had made inquiry of the Secretary of State as to whether the corporation had complied with the statute and designated an agent for the service of process.

Section 57 of the Code provides that a defendant corporation may be proceeded against by constructive service of process when it has no agent in the state "known to the plaintiff."

But, in view of the requirements of Section 571, Kentucky Statutes, it is incumbent upon a plaintiff desiring to proceed against a corporation to make a reasonable effort to ascertain the whereabouts of agents of the corporation, and to inquire of the Secretary of State to ascertain if the corporation has designated an agent for the service of process. The plaintiff may not shut his eyes to the truth and take refuge in his own ignorance, and thereby enable himself to make affidavit that the defendant corporation has no agent in the State known to him, and thus be permitted to proceed against it by constructive service of process.

In view of what has been said, it will be seen that the affidavit of the Commonwealth's Attorney was insufficient to justify the proceeding against the defendant corporation by warning order; and the court was, therefore, without jurisdiction to render the judgment which resulted in a sale of the lands in question and the execution of the deed to the purchaser, C. C. Smith.

For this reason, the judgment appealed from is reversed.

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### **Wheeler v. Burke, et al.**

(Decided January 14, 1915.)

#### **Appeal from Lawrence Circuit Court.**

**Schools and School Districts—Graded Schools—Election of Teachers.**—The Board of Trustees of a graded school may at any time in the calendar year elect teachers for the ensuing school year that begins in the year in which the election of teachers is made. So that teachers may be elected in January to teach during the school year that begins the succeeding July.

W. D. O'NEAL for appellant.

M. S. BURNS and J. T. SWETNAM for appellees.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

This litigation is the result of a controversy as to whether the appellant, Wheeler, or the appellee, John

Burke, had the lawful right to teach as principal the Blaine graded school in Lawrence county for the school year of 1914-1915.

It appears that in January, 1914, while Wheeler was employed as a teacher at this graded school, he was engaged, by a written contract executed by a majority of the Board of Trustees of the school, to teach as principal for the school year of 1914-1915. At the election of trustees held in May, 1914, two new members of the board were elected in the place of two persons who were members of the board in January, 1914. After the new board was organized, the members declined to recognize the contract made with Wheeler by their predecessors and employed the appellee, Burke, to teach the school as principal in his place. Thereupon Wheeler, in August, 1914, brought this suit against Burke and the trustees, asking that he be adjudged entitled to teach the school as principal and to the possession of the school building for this purpose, and that the defendants be enjoined and restrained from interfering with or obstructing him in the conduct of the school.

The answer of the defendants denied that Wheeler had been elected and asserted the right of what may be called the "new board" to employ Burke as teacher.

After some evidence had been taken, the case was submitted for hearing, and it was adjudged that the petition of Wheeler be dismissed, and he appeals.

The school year for graded schools begins on July first and ends July first of the succeeding year, and it appears that the Blaine graded school opened its session on August the first, 1914, or perhaps the first Monday in August.

The graded school law does not provide when graded school teachers shall be elected by the board of trustees, and, in the absence of any statutory direction on the subject, it is contended by counsel for Wheeler that the time when teachers shall be elected is left entirely to the discretion of the board of trustees, and hence the board had the power in January, 1914, to make the contract it did with Wheeler.

On the other hand, the argument is made that the board of trustees have no authority to elect a teacher for the ensuing school year until after July first of that year, and, of course, if this position is sound, the election of Wheeler in January, which was before the be-

ginning of the school year in 1914, was unauthorized and void.

In support of these respective views reasons entitled to some weight may be advanced. In behalf of the legality of the election of Wheeler it may be said that, although the personnel of the board may change, the board is a school body that continues in existence, and the acts of the members of one board are binding upon the members of a succeeding board, although the membership of the succeeding board may be composed altogether of persons who were not members of the preceding board. It may further be said that it is to the interest of graded schools that teachers for each school year shall be employed at as early a time in the calendar year in which the school begins as is practicable in order that the trustees may have the benefit of a large number of teachers to select from, which advantage they would not have if the election was postponed until after July first, as at that time of the year all the desirable teachers might have obtained employment, and it would be difficult to get competent teachers.

On the other side of the question the argument may be made that, as the election of trustees is held in May, the election of teachers ought to be subsequent to this time, so that the board of trustees who will have charge of the school for the ensuing school year may have the privilege of selecting a teacher of their own choice and one in harmony with their views of the manner in which the school should be conducted; and that it is not compatible with the best interests of a school that a board of trustees should have the right to select teachers for a school year beginning after their terms of office have expired and when other trustees will have charge of the affairs of the school.

But after considering these arguments our conclusion is that the election of Wheeler was within the power of the board.

Graded schools are a part of the common school system of the State, but these schools are managed and controlled by officers known as graded school trustees, and the common schools in each county are under the control and management of a board of education composed of the chairmen of the several educational division boards in each county, and these division boards have the authority to elect teachers for the educational di-

vision. The common school law further provides that trustees shall be elected in August of each year, but that teachers may be appointed or elected in June of each year; so that teachers of common schools might be elected by trustees who would not have charge of the common school during the school year for which the teacher was selected, as, after the appointment of the teacher and at the following August election, other and different trustees might be elected in place of those who were trustees when the teacher was appointed.

If the Legislature deemed it advisable to place the selection of teachers for common schools in the power of trustees who might not be the trustees in charge of the school for the school year for which the teacher was appointed, it seems to us that it would not be inadvisable to adopt the same rule upon this subject for graded schools.

So that, without further elaboration, we think that the trustees of a graded school may at any time in the calendar year elect teachers for the ensuing school year that begins in the year in which the election of teachers is made. According to this view, the election of Wheeler was legal, and the judgment is reversed with directions to enter a judgment granting him the relief sought in his petition.

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### **Weathers v. Commonwealth.**

(Decided January 14, 1915.)

#### **Appeal from Nelson Circuit Court.**

**Criminal Law—Instruction—Self Defense.**—An instruction reading, "If you believe from the evidence that at the time he shot and killed Henry Lewis (if he did so) the defendant, Charles Weathers, believed and had reasonable grounds for believing that he was in immediate danger of death or great bodily injury at the hands of said Lewis, and that defendant used such force and no more as was reasonably necessary, or as seemed to him at the time, in the exercise of a reasonable discretion, to be necessary to avert such danger, he is excusable on the ground of self defense and you should find him not guilty," presented correctly the law of self defense.

**NAT W. HALSTEAD, WALLACE BROWN and OSSO W. STANLEY** for appellant.

**JAMES GARNETT**, Attorney General, for appellee.



**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

The appellant, under an indictment charging him with the murder of Henry Lewis, was found guilty and his punishment fixed at imprisonment for life.

The evidence for the Commonwealth shows that the appellant, without excuse or provocation, shot Lewis twice in the back, and after he had fallen to the ground from the effect of these wounds, and was in a dying condition or dead, to make sure of his work, he shot him in the head.

Appellant, in his own behalf, testified that he killed Lewis in self-defense.

Allen Price, a witness for the Commonwealth, testified that about half an hour after Lewis had been shot he went to the place where he was lying dead in the road and took out of his pocket a pistol, and, without looking to see whether it was loaded or not, gave it to Maria Lewis, the mother of the deceased.

Maria testified, over the objection of counsel for appellant, that she examined the pistol after it was given to her by Price, and that it was unloaded, all the chambers being empty. It does not appear when she examined the pistol, but there is not a particle of evidence in the record tending to show that any change was made in the condition of the pistol from the time Allen Price took it from the pocket of the deceased until it was examined by his mother. That her evidence was competent is not debatable.

The coroner of Nelson county, who was also a practicing physician, testified that, on the next day after Lewis was killed, he held an inquest on his body and found, aside from the wound in his head, two holes in his back and two holes in the front of his body, and gave it as his opinion that the bullets that made these holes entered his back and came out in front.

It is objected that the examination by Dr. Greenwell, the coroner, of the wounds on the deceased occurred too long after they were made to make competent his opinion as to the points of entrance and exit of the bullets that caused the holes in his body. The fact, however, that the doctor did not examine the body until several hours after death did not render incompetent his opinion upon this subject, as there was no evidence or inference that these wounds had been tampered with before his examination. He related at some length his

examination of the body and what he found as a result of it, and the correctness of his opinion and the weight to be attached to it was for the jury to consider.

It is further urged that the evidence of Ken Price, the only eyewitness to the murder, was so contradictory as not to be worthy of belief, but the weight of this evidence was, of course, a matter for the jury, nor do we agree with counsel for appellant that it was so conflicting as to be unworthy of belief.

On the subject of self-defense the court instructed the jury that "if you believe from the evidence that at the time he shot and killed Henry Lewis, if he did so, the defendant, Charles Weathers, believed and had reasonable grounds for believing that he was in immediate danger of death or great bodily injury at the hands of said Lewis, and that defendant used such force and no more as was reasonably necessary, or as seemed to him at the time, in the exercise of a reasonable discretion, to be necessary to avert such danger, he is excusable on the ground of self-defense and you should find him not guilty."

It has been settled in numerous opinions of this court that the defendant has the right to act in the exercise of a reasonable discretion on the appearance of things as they seem to him, and that the jury should be instructed to view the situation confronting the defendant from his point of view at the time, and not as it might appear to them from the evidence. Or, to state it in another way, whether the defendant may be excused on the ground of self-defense depends on whether he, at the time, in the exercise of a reasonable judgment, believed, and had reasonable grounds to believe, it was necessary to take the life of the deceased to avert the danger, real or, to him, apparent, and not what the jury might think was necessary to be done under the circumstances. If the jury, from the evidence, believe that the defendant believed, and had reasonable grounds to believe, that it was necessary to take the life of the deceased to save himself from death or great bodily injury, they should acquit him, although, looking at the matter from the cool and deliberate view-point of the jury box, they might think that they could have found some other means to avert the danger.

The instruction given, we think, presented fairly and correctly the law of self-defense under the evidence in

this case. By the instruction the jury were told that if the defendant believed, and had reasonable grounds for believing, that he was in danger of death or great bodily harm at the hands of Lewis, and that he used no more force than was reasonably necessary, or than seemed to him, at the time, in the exercise of a reasonable discretion, to be necessary to avert the danger, they should acquit him. Under this instruction the question as to the imminence of the danger Weathers was in was left to his judgment and so was the question of the amount of force necessary to avert it left to his discretion. The jury, upon reading this instruction, could not fail to understand that they were to determine the guilt or innocence of the defendant from a consideration of the conditions as they appeared to him at the time, and not as they might appear to them.

In *Sizemore v. Commonwealth*, 158 Ky., 492, relied on by counsel for appellant, the instruction condemned left it to the jury and not to the defendant to say whether the defendant was in danger at the time he killed North.

In *Austin v. Com.*, 28 Ky. L. R., 1087, an instruction, in substance the same as the one given in this case by the court, was directed to be given.

Complaint is made of misconduct on the part of the Commonwealth's Attorney in the argument of the case. We have carefully read and considered the argument objected to and do not find in it any statement that would warrant a reversal.

Upon the whole case, it appears to us that the defendant had a fair trial and that the ends of justice, under the law, were no more than satisfied by the judgment appealed from, and it is affirmed.

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**Commonwealth, By et al. v. Standard Oil Company of Kentucky.**

(Decided January 14, 1915.)

Appeal from Jefferson Circuit Court  
(Chancery, No. 2).

**Taxation—Action by Revenue Agent to Recover on Omitted Assessment.**—In this action by a revenue agent to recover taxes on property omitted from assessment, the ruling of the lower court in dismissing the proceeding was erroneous in view of the ruling of this court in *Commonwealth v. Ewald Iron Co.*, 153 Ky., 116.

A. S. BULLITT and MATT J. HOLT for appellant.

HUMPHREY, MIDDLETON & HUMPHREY for appellee.

**OPINION OF THE COURT BY JUDGE NUNN—Reversing.**

This action was by a Revenue Agent to recover taxes on property omitted from assessment. The lower court sustained a motion to dismiss without prejudice. The ruling was made in attempted compliance with an Act of 1912, directing dismissal of such actions where there is a lack of diligence in prosecution. The Revenue Agent appeals.

Since then this court has construed the Act referred to. *Commonwealth v. Ewald Iron Co.*, 153 Ky., 116. It is conceded by appellee that the lower court erred in dismissing the action, in view of the ruling in the *Ewald* case.

The judgment is reversed for proceedings in conformity with the *Ewald* case.

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**Independent Life Insurance Company v. Evans.**

(Decided January 14, 1915.)

**Appeal from Jefferson Circuit Court  
(Chancery, No. 2).**

**Insurance—Action to Set Aside Writing Expressing Willingness to Cancel Contract of—Fraud.**—A writing signed by insured expressing a willingness to have a contract of insurance canceled does not amount to a cancellation, and the evidence showing it was procured by the fraud and misrepresentation of an agent of the company by which the insured who was sick and in a weakened condition, was overreached, the writing was properly set aside.

**BLACKWOOD & CARTMELL** and **H. O. WILLIAMS** for appellant.

**P. H. SAVAGE** and **A. J. BIZOT** for appellee.

**OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

The death of the appellee, Allen B. Evans, occurring after this appeal was taken, it has been revived in the name of his mother, Flora B. Evans, administratrix. The suit was filed to set aside a certain writing executed by Allen B. Evans, whereby he expressed a willingness to cancel a \$1,000 insurance policy, issued upon his life by the appellant, upon the payment to him of \$200. It is charged that the writing was procured by certain false and fraudulent representations of appellant's agent.

The insurance policy was issued to Allen B. Evans on November 17th, 1908, when he was 29 years old. The policy stipulates that in the event the assured shall become so totally and permanently disabled by reason of bodily injury or disease as to prevent him from engaging in any gainful occupation, then the company will pay for the insured the premiums accruing on the policy, and without any charge to the insured or against the policy. It is also stipulated that the policy shall be incontestable after one year from its date, except for non-payment of premiums.

The insured paid the annual premium in November, 1909, and November, 1910, and, in fact, tendered the premium accruing in 1911. The company refused to accept this 1911 payment, claiming that the writing involved in this action, executed a few weeks before the tender, cancelled the policy.

During 1909, the young man had a spell of malaria, and from which he never recovered. In his weakened condition, he soon became a victim of tuberculosis. As usual in such cases, he grew weaker and weaker, and after 1910 was confined to his bed a large part of the time. Feeling that he was totally disabled, early in October, 1911, he notified the company of this fact in writing, and requested the company to pay the premiums and keep his policy alive according to its terms. The company instructed its physician, Dr. Lindenberger, to examine him. Dr. Lindenberger visited and examined the insured on October 23rd, 1911. He found the conditions above mentioned, and testifies that the insured was totally disabled by reason of that disease, and so notified the company. The insured heard nothing from the company until October 30th, when he was visited by its agent, Mr. Keane. The young man was sitting up at the time, and Keane's visit, which lasted from one hour and a half to three hours, as estimated by the witnesses, resulted in the writing which is sought to be set aside. According to Evans and his mother, Keane began to ingratiate himself into their confidence by recounting his old friendship with the elder Evans, and the fact that his religious faith was the same as the Evans'. Then, at his request, Allen Evans went with him into another room for a private conversation. Keane told him he had come to see about the insurance, and first offered a return of the premiums with six per cent interest. This

being refused, he told him the company was canceling all of its policies, and was preparing to quit business in the State, and suggested that if Evans knew as much about the company as he, Keane, did, he would accept the proposition. He finally offered to pay \$200 for a cancellation of the policy. Keane says the conversation with reference to old friendship and religious affinity did not occur until after his \$200 offer was accepted. He admits that the company was not canceling any policies and was making no preparation to quit the State; says it was solvent, and that he knew of no reason why one should be willing to accept less than its contract obligation in order to secure a present settlement with it. But he denies making any such representations about the company. Both agree that at this time his mother was called into the conversation, and she was informed of the proposition with request for her advice. She said it was her son's affair, and he would have to act for himself. Anyhow, the following writing was then drawn up and signed by the young man:

“Louisville, Ky., October 30, 1911.

“Allen B. Evans will accept \$200.00 in full settlement for his policy with the Independent Life Insurance Company for full settlement on No. 467 on my life.

“ALLEN B. EVANS.”

Allen Evans testifies that he told Keane he would not and did not intend to bind himself in this matter until he could consult with his father when he returned home that night, and Keane agreed to this, and said he would come back next morning with the money and get the policy. Keane denied that the young man signed it with any such reservation. The \$200 was never paid, nor was the policy ever surrendered or canceled in fact. The company relies upon the writing above quoted as its cancellation. Keane testifies that the next morning he returned to the house with the money and tendered it to Allen Evans, but he would not accept it, and said that he had been advised by his father and physician not to surrender the policy.

Mrs. Evans says that Keane never had any such conversation with her son, and made no tender of the money nor demand for the policy. She says that he did come there next morning and she met him on the front porch; that her son was upstairs in bed; and she would not let Keane enter or see the boy, and he did not see or talk with

him, because the doctor had said his physical condition was such that he should see no one. Allen Evans is not introduced again to testify on this proposition. His testimony, which we have referred to, was given by deposition taken while he was in bed and before Keane testified.

The action is in equity and such conflict as there was in the evidence was passed upon by the trial judge. His finding is supported by the weight of the evidence, and we will not disturb the judgment, which sets aside the writing.

The written opinion of the lower court, filed with the record, is so pointed that we copy it:

"The plaintiff was a confined and hopeless invalid, and was dependent upon his family for nursing, medicines, etc. He had been in that condition for several months. In response to his letter seeking to avail himself of the total disability clause in his policy, the defendant sent its physician to examine him and was advised by the physician that plaintiff was afflicted with advanced pulmonary tuberculosis. Thereupon a special agent of defendant was sent to him for the purpose of securing a cancellation of the policy. The plaintiff had not contemplated a cancellation or surrender of his policy up to that time. He was very weak physically and was in no condition to carry on negotiations of several hours, and at the end cope with a strong and vigorous person such as the agent of defendant. Under such circumstances, it would not be difficult, through religious sympathies, for the agent to ingratiate himself with plaintiff and to win his confidence. He was sent there to secure a cancellation of this contract and he accomplished his mission. From the physician's report upon the risk, it was a profitable transaction on the part of the defendant company to pay \$200.00 in cash to get from under the certain and near liability for \$1,000.00, and the suggestion that the cash value of the policy was \$11.90 only is of no importance. The weight of the testimony shows that the plaintiff was overreached in the matter of the agreement to surrender and cancel the policy for \$200.00, and there can be no doubt that plaintiff is totally incapacitated from pursuing a gainful calling."

In view of the young man's physical condition, and the fact that the company would soon have to pay the policy in full, and the further fact that the purpose of Keane's visit was to secure a cancellation of it in behalf

of the company, it is unreasonable to believe that the young man would have signed a writing for \$200 whereby he surrendered an almost immediate right to \$1,000, unless he was overreached and put in fear, particularly, if he was as strong mentally as Keane would have us believe. Keane must have shaken the insured's faith in the solvency of the company, as testified to by the insured, in order to gain his consent to take one-fifth of the amount due him under the contract, and which all concerned realized was soon to accrue.

More than this, the writing signed by the boy is nothing more than a proposal. Keane says that he accepted the proposition next morning, and tendered the amount called for, but this is denied by Mrs. Evans. Certain it is, the money was never paid, nor did the company get possession of the policy nor an actual cancellation. The writing itself does not amount to a contract, and the evidence is not convincing enough to put it in that category.

Wherefore the judgment of the lower court is affirmed.

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### **Andonique v. Carmen.**

(Decided January 14, 1915.)

#### **Appeal from Jefferson Circuit Court (Common Pleas, No. 2.)**

1. **Landlord and Tenant—Defect in Premises—Action by Tenant for Personal Injuries.**—In a suit by a tenant to recover of the landlord for personal injuries sustained by falling through a floor, occasioned by rotten joists, the defect was a latent one and the law did not impose upon the tenant the duty of tearing up the floor to inspect the same. Her duty was a reasonable inspection, such as ordinarily prudent persons would make under similar circumstances.
2. **Instructions.**—The mere circumstance that an instruction, although a proper one, was not given on the first trial, and, therefore, not considered and approved by this court on appeal, does not of itself preclude the giving of it on a second trial.
3. **Personal Injuries**—In a suit to recover for personal injury, the financial circumstances of either party is not a matter for consideration, and it was not error to refuse to admit evidence of the financial ability of the injured party to endure the loss.

BURWELL K. MARSHALL and JOHN L. WOODBURY for appellant.

GORDON & LAURENT and J. L. RICHARDSON for appellee.



## OPINION OF THE COURT BY JUDGE NUNN—Affirming.

The appellee was a tenant of appellant, who was a non-resident. The Fidelity Trust Company was local agent of appellant. The trust company made the lease contract and collected the rents. While in a privy on the premises, the floor gave way and appellee was plunged into the vault, 10 or 12 feet deep. She was messed from head to foot with fecal matter; her person was bruised and her spine permanently injured. She was confined to bed for four weeks, and is still unable to do housework. She recovered \$1,999.99, the amount prayed for. This is the second trial. She recovered the same amount at the first trial, but, on appeal, the judgment was reversed. 151 Ky., 249.

Evidence on the two trials was substantially the same, so that there is nothing to add to the statement of facts given in the former opinion.

The case was reversed for error in instructions. The second trial, which we are now considering, conformed to the opinion, and the court gave the instructions therein directed. Appellant insists that the court should have given a peremptory instruction because the appellee testified she made no inspection of the floor of the privy. We believe the appellant misconceives her testimony. She did not tear up the floor to inspect the rotten joists, and the law does not impose any such duty upon her. The defect in the joists was a latent one. The floor covering was sound. In the nature of things, she was at the privy daily during the six months of her tenancy, and, as she says, she scrubbed and washed the floor frequently with her own hands, and never discovered the defect. These facts constitute such a reasonable inspection as an ordinarily prudent person would make under similar circumstances, and are such facts as to justify a submission of the question to the jury as to whether the defect should have been discovered. It does not meet the case to say that her opportunities were as good as appellant's to discover the latent defect. There was proof to show that appellant's agent had actual notice of the particular defect, and that requests for repairs or reconstruction were made by the tenant who occupied the premises just preceding the appellee. These facts of notice eliminate from the case any question of appellant's opportunity for discovering the defect.

In addition to giving the instructions directed in the former opinion the court gave this instruction:

"If notice was given in this case to N. R. Kinser, cashier of the Fidelity Trust Company, such as is set out and defined in instruction No. 2, such notice was notice to the Fidelity Trust Company."

Appellant does not complain that this was an erroneous statement of the law, but insists that the former opinion is the law of the case, and that the giving of the instruction quoted was error, because it was not given on the former trial, and there was no direction for it in the opinion. This instruction does not fall within the rule which condemns instructions that give undue prominence to any particular state of facts. In truth, the prime question in the case was whether appellant's agent, a corporation, had notice of the latent defect. Appellee's proof showed that notice was given by the former tenant to Mr. Kinser, who was cashier of the corporate agent, and collector of the rents. Whether notice to the corporation's agent was notice to the corporation is a question of law for the court. The matter of fact for the jury's decision was whether this notice was, in fact, given to the corporation's agent. The mere circumstance that an instruction, although a proper one, was not given on the first trial, and, therefore, not considered and approved by this court on appeal, does not of itself preclude the giving of it on the second trial. The instruction brought to the jury in concrete form the most salient issue in the case.

Appellant argues that appellee had ceased doing her housework, not that she was physically unable to do it, but because she had become, in a measure, prosperous, and was financially able to employ a servant. To support this argument evidence was offered of the record of two or three real estate transfers in which appellee was a party. The court rejected the evidence as incompetent, and appellant says this was error. The records do not show whether the appellee made or lost money in the transactions, but, in either event, the evidence is immaterial, because recovery is based upon the injury or loss she sustained rather than upon her financial ability to endure it. The financial circumstance of either party to litigation is not a matter for consideration in such case.

The judgment is affirmed.

**Backsman v. Courtesy, et al.**

(Decided January 14, 1915.)

## Appeal from Campbell Circuit Court.

1. **Landlord and Tenant—Lease—Cancellation—Violation of Covenant—Evidence.**—In an action to cancel a lease on the ground that the lessee violated the covenant of use, suffered a nuisance on the premises, and committed a waste, evidence examined, and held, that the use of the building by defendant, a confectioner, to manufacture ice cream and candy, and the installation of two small motors for this purpose was not a violation of a provision of the lease that the premises should be used for "store and dwelling."
2. **Landlord and Tenant—Lease—Cancellation—Nuisance—Evidence.**—In an action to cancel a lease, evidence examined, and held not to sustain a charge of nuisance resulting from the fact that defendant, while engaged in making ice cream, permitted water to run on the floor and under the building and into the adjoining yard.
3. **Landlord and Tenant—Lease—Cancellation—Waste—Evidence.**—In an action to cancel a lease, evidence examined and held not sufficient to show that defendant had committed a waste by allowing water from the floor to run under the house, resulting in a sunken condition of the house and an adjoining shed.

H. GUNKEL, JR. for appellant.

OTTO WOLFF for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

This is an action to cancel a lease on the ground that the lessee violated the covenant of use, suffered a nuisance on the premises, and committed waste. The chancellor denied the relief prayed for, and plaintiff appeals.

Plaintiff, Francis Backsman, is the owner of an old-fashioned building on Monmouth street, in Covington. The building contains a store room and several rooms used for residence purposes. In the rear of the store room is a shed. In 1911, plaintiff rented the premises to Pete Courtesy for a period of ten years, with the privilege of five years longer. Courtesy conducted a confectionery business in the building under the name of Princess Confectionery Company. S. Demopoulos worked for Courtesy, and subsequently bought the business from him, at the same time taking an assignment of the lease. The lease provided that the premises should

be used for "store and dwelling." The lease contained further stipulations to the effect that the lessee should not permit any nuisance on the premises, or commit waste. It appears that Demopoulos installed two small motors in the shed and used them for the purpose of making candy and ice cream. It is insisted that as the building was rented for a store and dwelling, the manufacture of candy and ice cream was a violation of the covenant of use. Defendant pleaded that the making of ice cream and candy was incidental to the confectionery business, and it is contended that because he introduced no evidence on this question the violation of the covenant of use stands confessed. We take it, however, that the burden was on plaintiff to show a violation of the covenant of use, and, in the absence of convincing evidence to the contrary, we are not inclined to hold that where a store room is rented for confectionery purposes, the making of candy and ice cream and the installation of two small motors to be used for that purpose, constitute a violation of the use for which the premises were rented. It would be a harsh rule indeed that worked a forfeiture of the lease merely because the lessee, who was a confectioner, made his candy and ice cream upon the premises instead of purchasing them from others. In our opinion, there was no violation of the covenant of use.

There was some proof to the effect that the defendant, Demopoulos, while engaged in making ice cream, permitted water to run on the floor and under the building and into the adjoining yard, and that complaints of this fact were made by the neighbors on two or three occasions. On one occasion the health officer was called in and told defendant that this must not occur again. It does not appear that any further complaints were made. These acts did not amount to a nuisance.

Several witnesses testified that defendant frequently used a hose to wash the floor of the shed, and that this water and the water from the ice cream freezer flowed under the house, and not only the sills of the shed, but the house itself, had sunk because of the damp condition of the ground. The evidence for the defendant showed that the roof of the shed leaked, and that the gutter of the house was in bad condition and that the water complained of came from these sources. His witnesses also deny that there was any sinking of the shed or of the main building. It further appears that defendant, on

complaint being made, built a cement floor in the shed and drained it toward his own yard and into a cesspool thereon. The evidence also shows that the building was very old; that the cesspool occasionally became clogged up, and by reason of this fact the water accumulated in the cellar. It is very doubtful whether the sills rotted or the building sank as a result of the water which defendant used in the making of ice cream and candy. Indeed, the evidence is by no means convincing that any part of the building has sunk since the defendant has been in possession of the property. Under the circumstances, we see no reason to disturb the finding of the chancellor, who concluded that no waste had been committed.

Judgment affirmed.

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## Hall v. Smith-McKenney Company.

(Decided January 14, 1915.)

### Appeal from Shelby Circuit Court.

1. **Landlord and Tenant—Intoxicating Liquors—Injunction.**—Where a landlord is liable to a fine for permitting his property to be unlawfully used for the sale of intoxicating liquors, he has the right to have such illegal use by his tenant restrained by injunction.
2. **Intoxicating Liquors—Local Option Election—When Effective.**—A local option election held under section 2557 of the Kentucky Statutes, as amended by the Act of 1914, becomes effective at the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court; but if a contest be instituted, and a notice thereof is served on the county judge before the certificate has been recorded, then the certificate is not to be recorded, and the status existing before the election continues.
3. **Appeal—Supersedeas.**—A supersedeas suspends the efficacy of a judgment.
4. **Appeal—Supersedeas—Suspending Local Option Election.**—An appeal, with supersedeas, under section 2567 of the Kentucky Statutes, from the decision of a canvassing board giving the result of a local option election, has the effect of suspending the election until the final determination of the appeal.
5. **Intoxicating Liquors—Local Option Election—Contest.**—Where a local option election is contested, the decision of the contest board takes the place of the certificate of the canvassing board, under sub-section 6 of section 2566 of the Kentucky Statutes; and

if a decision of the board be that a majority of the legal votes cast at the election was against the sale of intoxicating liquors, the entry of the decision of the contest board on the order book of the county court is to have the same effect as the recording of the certificate of the canvassing board, required to be given and recorded before a contest is instituted.

6. **Intoxicating Liquors—Local Option Election—Contest—Appeal.**—When an appeal to the circuit court is determined, the judge of the county court may then record the decision of the contest board on his order book, unless an appeal with supersedeas is immediately taken, and everything done under the judgment before it is superseded will be valid; but when the judgment is superseded, nothing thereafter can be done by virtue of it until the appeal is determined.
7. **Intoxicating Liquors—Local Option Election—Contest—Appeal.**—Where the decision of the contest board was recorded on the county court order book before an appeal was taken therefrom, it is not necessary to again record the decision in case the election should finally be sustained; the decision having been properly recorded, it will be in force on the day the final judgment becomes effective, provided sixty days shall then have elapsed after the decision of the contest board was recorded.

HAZELRIGG & HAZELRIGG and WILLIS, TODD & BOND for appellant.

O'REAR & WILLIAMS, W. C. BECKHAM and E. B. BEARD for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—**  
Sustaining motion to dissolve injunction.

At a local option election, held September 28, 1914, in Shelby county, including the city of Shelbyville, there was a majority of 593 votes against the sale of intoxicating liquors in said county and city. On October 1, 1914, the County Board of Election Commissioners canvassed the election returns, made a certificate showing the result as above indicated, and delivered said certificate to the county court clerk.

A contest was instituted on October 9, 1914, before the board of contest, consisting of the judge of the county court and two magistrates, and notice of contest was served upon the judge of the county court as required by the statute. On October 12, 1914, the certificate of the canvassing board showing the result of the election, and which theretofore had been delivered to the clerk of the county court, was spread on the order book of the county court by the judge of the county court. By its decision of November 5, 1914, the contest board upheld

the election and dismissed the contest, and its decision was that day recorded upon the order book of the county court. Thereupon the contestants appealed to the Shelby Circuit Court on November 14th, and superseded the judgment dismissing their contest.

The defendant, Smith-McKenney Company, conducts a drug store in Shelbyville in a house belonging to the plaintiff, Matthews Hall, its lease extending one year from November 10, 1914. The Smith-McKenney Company held a license from the city of Shelbyville which authorized it to sell intoxicating liquors for one year expiring on October 14, 1914. On that date it renewed its said license for one year, paying \$500 as a license fee.

Conceiving that the local option law became effective in Shelbyville on December 12, 1914, which was sixty days after the certificate of the canvassing board had been spread upon the order book of the county court, Hall brought this action on December 17, 1914, against his tenant, the Smith-McKenney Company, to enjoin it from further selling intoxicating liquors upon the premises which it had leased from Hall; and the circuit judge having granted said injunction, application is now made for a dissolution thereof. Owing to the importance of this question, the argument upon the motion was heard and the decision thereof participated in by the whole court, excepting Judge Turner, who was absent on account of illness.

If the local option law is in effect in the city of Shelbyville, the plaintiff, Hall, is liable, under Section 2557 of the Kentucky Statutes, to a fine for permitting his property to be unlawfully used for the sale of intoxicating liquors; and, being so liable, he has the right to have such illegal use restrained by injunction. So, it will be seen that the question presented for decision is this: Has the local option law become effective in Shelbyville by reason of the election held on September 28, 1914, notwithstanding the subsequent contest and the appeal and supersedeas above recited?

A decision of this question requires a review of the local option law of 1894, found in Article 1, Chapter 81 (Sections 2554-2568) of the Kentucky Statutes, and said act as amended by the act approved March 13, 1914 (Acts 1914, p. 49). The act of 1914 amends only Sections 2554 and 2557 of the local option law of 1894; all

other sections and provisions of the act of 1894 remain in full force; no attempt was made to amend them.

Briefly reviewing the material provisions of the act of 1894, and prior to its amendment in 1914, we find that Section 2554 authorized the calling of a local option election to take the sense of the voters by a written petition signed by a number of legal voters in each precinct of the territory to be affected, equal to 25% of the votes cast in each of said precincts at the last preceding general election.

It will be noticed that this section required the petition for a county election to be signed, not by a number equal to 25% of all the voters of the county at the last preceding general election, but by a number in each precinct which should be equivalent to 25% of the votes cast in that precinct. Section 2555 prescribes the duty of the county clerk, the sheriff, and the election officers in holding the election; while 2556 provides that if it shall be found that a majority of the legal votes cast at any such election were for or against the sale of intoxicating liquors in the county, it shall be the duty of the canvassing board to certify that fact, which certificate shall be delivered to the clerk of the county court, and by him safely kept until the next regular term of the county court, at which term the judge thereof shall have the same spread on the order book of his court. Section 2566 provided, however, and still provides, that when notice of a contest is executed on the county judge, the certificate shall not be recorded.

Section 2557 provided that after the entry of the certificate of the canvassing board in the order book of the county court, it should be unlawful for anyone to sell intoxicating liquors in the territory covered by the election, if the vote therein was given against the sale of intoxicating liquors; and it prescribed a fine of not less than \$60.00 nor more than \$100.00, or confinement in the county jail for not less than ten days nor more than forty days, or both fine and imprisonment, for each offense. Said section also imposed a fine of not less than \$60.00 nor more than \$100.00 upon any person who knowingly rented a house in which intoxicating liquors were sold in violation of the act.

Section 2557a defines a sale; Section 2557b prescribes the essentials of the indictment and the effect to be given a United States license in said prosecutions; Sec-



tion 2558 exempts certain dealers to whom the law does not apply; Section 2558a permits the sale by wholesale in certain cases; Section 2559 requires a deposit of money by the petitioners to pay the expenses of the election; Section 2560 as amended in 1912 contains the county unit law; Section 2561 makes it unlawful to sell intoxicating liquors in any territory where a majority of the legal voters thereof have voted against its sale; Section 2562 provides a penalty for illegal voting; Section 2563 limits the number of elections in any particular territory to one in three years; Section 2564 makes it the duty of the circuit judges to give the local option law in charging the grand juries of the counties within their jurisdiction; Section 2565 prevents the selling of liquor on an election day, and prescribes a penalty therefor; and Section 2566 provides for the contest of a local option election, and prescribes the procedure therein.

Section 2567, being the next to the last section in said article, reads as follows:

“The contestants or contestees shall have the right to appeal from the decision of the board to the circuit court of the county where the contest is pending, in the same way as appeals are taken from the quarterly court to the circuit court; an appeal may also be taken from the circuit court to the Court of Appeals.”

Finally, Section 2568 provides that the cost of the contest shall be adjudged against the unsuccessful parties. We thus have a statute of fifteen separate and distinct sections, covering every question from the calling of the election to the payment of costs upon the final determination of a contest, including an appeal as in other civil cases.

Turning now to the act of March 14, 1914, for the changes in the law, we find that it modified the law of 1894, above outlined, in two respects only. First, it repealed Section 2554, which required the election petition to have the signatures of a number of voters equal to 25% of the legal voters of each precinct at the last preceding general election, and substituted, in lieu thereof, a new Section 2554, which authorizes the calling of a local option election upon a petition “signed by a number of legal voters in any county \* \* \* to be affected equal to 25% of the votes cast therein at the last preceding general election.” There is no other substantial change in the section; it merely authorizes a

local option election now to be held upon the petition of 25% of the legal voters of the entire county, as shown by the last election, regardless of their residences. Under the amendment it is not required that the petition shall have 25% of the voters of each precinct of the county; it is sufficient if the petition is signed by 25% of the voters of the entire county, regardless of their residences or the precincts wherein they voted. The amendment to Section 2554 related only to the calling of the election, and has no bearing upon the question before us, as to when the election becomes effective.

The amendment of 1914 also repealed Section 2557 of the Kentucky Statutes, and substituted in lieu thereof the following section:

“Whenever a local option election shall be held in any county, city, town, district or precinct in this State and a majority of the votes cast at said election shall be in favor of prohibiting the sale of liquor in the territory in which the election shall have been held, the law prohibiting said sale shall be in full force and effect at the expiration of sixty days *from the date of the entry of the certificate of the canvassing board in the order book of the county court*, and after the expiration of said sixty days no liquor license theretofore issued in said territory under the laws of this State shall be of any force or effect whatever, but the owner of said license shall be entitled to recover from the said county, city, town, district or precinct to which the license money was paid, such proportional part thereof as the unexpired period of license bears to the whole of the year; and any person who shall after sixty days sell, barter, or loan, directly or indirectly, any such liquors in said city, county, town, district or precinct, shall, upon conviction, be fined not less than \$60 nor more than \$100 and be confined in the county jail for not less than twenty nor more than forty days for each offense, and any person who knowingly furnishes or rents a house, room, wagon or any conveyance or thing in which spirituous, vinous or malt liquors are sold, bartered, or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than \$60 nor more than \$100, and the house, wagon, vehicle or other thing in which the liquors were sold, bartered, or loaned shall be liable for all fines adjudged against the person selling, bartering, or loaning the same. In the event that a majority of the votes cast at

said election shall be in favor of the sale of liquors, then no license shall be granted to any person, firm or corporation to sell such liquors in said territory until after the expiration of the aforesaid sixty days if the issuing of the liquor license was in that territory prohibited by law prior to the holding of said election."

It will be recalled that in case the vote was against the sale of liquors the original Section 2557, above referred to, made it unlawful for anyone to sell intoxicating liquor in the prohibited territory "after the entry of the certificate of the canvassing board in the order book of the county court," as provided for by Section 2556 of the Kentucky Statutes. It will further be noticed that in case the vote is against the sale, the amendment of 1914, above set forth in full, provides that the law prohibiting the sale "shall be in full force and effect at the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court." It is true the amendment proceeds to say that "after the expiration of said sixty days" no liquor license theretofore issued in said territory under the laws of this State shall be of any force or effect whatever; but that language adds nothing to the former clause which, in express and unmistakable terms, fixes the date for the prohibition law to go into effect "at the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court." So, when the amendment supplemented the prohibitory clause by providing that "after the expiration of *said sixty days*" no liquor license theretofore issued should be of any force, it merely repeated the prohibition for the purpose of making plain the subsequent provision, that whenever the law became effective the owner of the license should be entitled to recover the unearned portion of his license money. But in no event should the prohibition law become effective until "at the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court."

Prior to the amendment, by the terms of the statute then in force, the law became effective immediately "after the entry of the certificate of the canvassing board in the order book of the county court." It is plain, therefore, under that law, as well as under the amendment of 1914, the controlling date for the law to become

effective was the entry of the certificate of the canvassing board in the order book of the county court; it taking effect under the old law immediately upon the entry of the certificate, and sixty days thereafter under the amendment. Moreover, the last clause of the amendment contains the correlative provision that in the event a majority of the votes cast at such an election shall be in favor of the sale of liquors, no license shall be granted for that purpose "until after the expiration of the aforesaid sixty days if the issuing of the liquor license was in that territory prohibited by law prior to the holding of said election."

The original Section 2557 contained no provision for the refunding to the licensee any proportional part of his license money in case an election became effective during the period covered by his license; but the amended Section 2557 expressly provides that, after the local option law becomes effective, the owner of the license may recover from the county, city, town, district or precinct to which the license money was paid, such proportional part thereof as the unexpired period of license bears to the whole of the year.

So, in this case, under the amendment of 1914, the question is, as it was under the original act of 1894: When does the election become operative in case of a contest and an appeal from a superseded judgment of the canvassing board? The statutory provisions in this respect are precisely the same under the law as amended in 1914 as they were under the law of 1894; the sections of the statute prescribing the practice in cases of contest and appeals therefrom remain unchanged. Section 2567, above set out, remains unamended and unchanged; it formerly provided, and now provides in express terms, that either the contestants or the contestees shall have the right to appeal from the decision of the canvassing board to the circuit court "in the same way as appeals are taken from the quarterly court to the circuit court." It thus became necessary, in applying this section to local option elections, to determine what was the effect of taking an appeal from an adverse judgment of a quarterly court to the circuit court, in case it had been superseded, as provided by the Civil Code of Practice.

In speaking for this court, as early as 1836, in *Runyon v. Bennett*, 4 Dana, 598, Judge Marshall said: "A

supersedeas suspends the efficacy of a judgment." This rule has become elementary, and has been cited with approval and followed undeviatingly. *Weber v. Tanner*, 23 Ky. L. R., 1109, 64 S. W., 741; *Hey v. Harding*, 25 Ky. L. R., 1455, 78 S. W., 136; *Commonwealth v. Weisenberg*, 126 Ky., 13; *Hazelrigg v. Douglass*, 126 Ky., 746; *Gardner v. Continental Ins. Co.*, 31 Ky. L. R., 70, 101 S. W., 911; *U. S. F. & G. Co. v. Jones*, 133 Ky., 622; *Townsend v. Gorin*, 144 Ky., 676.

Applying this rule to appeals in local option contests, this court has consistently and uniformly held that the provision granting an appeal from the decision of the canvassing board in the same way as appeals are taken from the quarterly court to the circuit court, had the effect of suspending the election until the final determination of the appeal. This conclusion was reached by reading Section 2557, which makes the entry of the certificate of the canvassing board in the order book of the county court the date at which the election is to become effective, in connection with Section 2566, which expressly provides that the certificate of the canvassing board shall not be recorded after a notice of the contest is executed on the county judge.

In the late case of *May v. Commonwealth*, decided November 10, 1914, and reported in 160 Ky., 785, this question was again examined; and it was there again held that in local option cases, as in other cases, a supersedeas bond with a supersedeas order suspends the efficacy of the judgment, and stays proceedings on it until the final determination of the case.

It being conceded that the election could not, under Section 2557, become effective until the certificate of the canvassing board was entered upon the county court order book; that it could not, under Section 2566, be so entered after notice of the contest was served upon the county judge; and that, by the appeal and supersedeas under Section 2567, and the authorities above cited, the recording of the certificate was suspended, it would seem necessarily to follow, in the absence of some statutory provision to the contrary, that the election did not become effective until after the determination of the appeal and the subsequent entry of the certificate of the board upon the order book of the county court.

In considering this question in *Townsend v. Gorin*, 144 Ky., 676, this court said:

“The purpose of the statute in requiring the certificate of the canvassing board to be kept until the next regular term of the county court before it is recorded, is to give an opportunity to the defeated side to contest the election, and if the contest is instituted and the notice is served in the meantime on the county judge, the certificate is not to be recorded. In that event, the status existing before the election continues. When the contest is decided, the decision of the contest board shall be entered on the order book of the county court, that is, it is the duty of the county judge to have it so entered. But this provision of the statute is to be read in connection with the provision immediately following to the effect that the defeated party may appeal to the circuit court in the same way as appeals are taken from the quarterly court to the circuit court. If the appeal is taken before the county judge enters the certificate on the order book it should not thereafter be entered on the order book. If the appeal is not taken until after the county court has entered the decision upon the order book, then the judgment of the contest board is in effect until the appeal is taken and the judgment is superseded; but when the judgment is so superseded, what has been done under it which was legal when done is not thus rendered illegal; but no further steps can be taken under the judgment after the supersedeas is issued; for the judgment is thus rendered inoperative so long as the appeal is undetermined. In the same way, when the appeal is determined in the circuit court, the judge of the county court may then record the decision on his order book unless an appeal with supersedeas is immediately taken, and everything that is done under the judgment before it is superseded will be valid, but when the judgment is superseded its vitality is taken away, and nothing thereafter can be done by virtue of it, as it then stands as though it had never been rendered until the appeal is determined. When an appeal is taken from the decision of the contest board to the circuit court and the judgment is superseded, the situation is just the same as in the case of an appeal in an ordinary action from the quarterly court to the circuit court with supersedeas. The same rule applies when an appeal with supersedeas is taken to this court from the judgment of the circuit court, as in other cases appealed to this court with supersedeas.

"The statute should be carried out according to its spirit by both sides. Its purpose is to allow the defeated side to appeal with supersedeas, and thus preserve the existing status."

This uniform ruling of the court upon the effect of a supersedeas in local option elections had become well settled, and was, of course, well known to the Legislature of 1914, when it enacted the amendment of that year. If it had intended to change the effect of the law in this respect, so as to make the election effective at the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court, notwithstanding an appeal and supersedeas, it would not only have been quite easy to do, but it was to be expected that it would have been done in express terms. A few lines providing that the service of the contest notice should not prevent the recording of the certificate, or that the law should become effective at the expiration of the sixty days after the entry of the certificate, notwithstanding the contest, appeal and supersedeas, would have been sufficient. But as no attempt was made to change the statute in these respects, it must be given its well-settled meaning and effect. In leaving these provisions of the old law unamended and untouched, the conclusion is unavoidable that the Legislature fully understood the effect that was to be given them.

It is an elementary rule of construction that repeals by implication are not to be favored; and this is especially true where a statute has been given a well-settled meaning by repeated adjudications of a court of last resort.

But when it came to deal with the situation after the election had become effective, the new Section 2557, as amended in 1914, made a radical change by providing for the refunding of the unearned portion of the license fee. Under the former statute, as construed by this court, when the dealer renewed his license, say for a year, pending an appeal sustained by a supersedeas, he was allowed to sell intoxicating liquors for the period of the license, notwithstanding the fact that the local option law may sooner have become effective by reason of the final disposition of the contest. *Watts v. Commonwealth*, 78 Ky., 329; *May v. Commonwealth*, *supra*, and the cases there cited.

Evidently the amendment of 1914 undertook to avoid the construction theretofore put upon the statute in this respect, since it expressly provided that after the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court, no liquor license theretofore issued should be of any force or effect whatever, "but the owner of said license shall be entitled to recover from the said city \* \* \* to which the license money was paid, such proportional part thereof as the unexpired period of license bears to the whole of the year." From this express provision it is clear that the Legislature intended to change the old rule laid down in the former cases, which permitted the license to run its full course, although the prohibition law had become effective in the meantime, and to annul all licenses at the expiration of the sixty days after the entry of the certificate upon the order book of the county court, providing, however, for the refunding of the unearned portion of the license fee.

In the case at bar the defendant's license expired October 14, 1914, and it was renewed upon that day for another year. On December 12, 1914, that being sixty days after the certificate was recorded, the defendant tendered its license back to the city and demanded the return of the proportional part of its license money; but the city refused to accept the license, or to refund the money. But if it should be finally determined that the election of September 28, 1914, was valid, defendant's license will stand revoked from the date of such final determination, and in this event the defendant will be entitled to have a proportional part of its license money repaid to it, according to the then unexpired term of its license.

The county judge should not have recorded the certificate of the canvassing board on October 12, 1914, and the recording was without effect, because the notice of contest had theretofore been served. Kentucky Statutes, Section 2566; *Townsend v. Gorin*, 144 Ky., 676. And a contest having been filed, the decision of the contest board takes the place of the certificate of the canvassing board, under Sub-section 6 of Section 2566, which reads as follows:

"The decision of the board shall be given in writing and signed in triplicate. One copy shall be delivered to the contestants, and one copy to the contestees, and the other shall be delivered to the county clerk of the county in which the contest is pending, which shall



be entered on the order book of the county court; and if the decision of the board be that a majority of the legal votes cast at the election were against the sale of such liquors, the entry of such decision shall have the same effect as the recording of the certificate of the examining board as hereinbefore provided."

When an appeal to the circuit court is determined, the judge of the county court may then record the decision of the contest board on his order book, unless an appeal with supersedeas is immediately taken. *Townsend v. Gorin, supra*. But since the decision of the contest board in this case was recorded on November 5, 1914, and the appeal therefrom was not taken until November 14th, it will not be necessary to again record it, in case the election should finally be sustained. The decision having been properly recorded, the appeal and supersedeas only suspended its efficacy pending the appeal. If the election be sustained in this case, it will be in force on the day the final judgment becomes effective, which will necessarily be more than sixty days after the decision of the contest board was recorded. But, as the case now stands, the decision of the contest board is suspended by the appeal and supersedeas.

It follows that the motion to dissolve the injunction granted by the circuit court will have to be sustained, and it is so ordered.

Judges Settle, Carroll, Nunn and Hurt concur in this ruling, and by order of court this opinion will be printed in the Kentucky Reports.

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## Jonas v. South Covington & Cincinnati Street Railway Company.

(Decided January 15, 1915.)

### Appeal from Campbell Circuit Court.

1. **Personal Injuries—Action for—When Question of Negligence one for the Jury.**—Where, in an action to recover damages for personal injuries sustained by the plaintiff, there were but two witnesses testifying, the plaintiff's testimony being to the effect that upon his failing to grasp the handle bar of a street car, his injuries were caused by the act of the conductor in catching and holding him by the arm, thereby compelling him to run with the car and when released by the conductor to fall and break his leg; and the testimony of the remaining witness being to the effect that the

conductor did not catch or hold plaintiff until after he had grasped the car and failed to let it go when commanded by the conductor to do so, and that plaintiff's injuries were caused alone by his holding to and being dragged and thrown by the car; the refusal of the trial court to submit to the decision of the jury the question whether plaintiff's injuries were caused by the negligence of the conductor or by his own negligence, was error.

2. Trial—When Verdict Should Be Directed by the Court—When Question of Negligence Should be Submitted to the Jury.—It is the province of a jury to pass upon and decide questions of evidence if the evidence is contradictory or conflicting; but it sometimes becomes the duty of the trial court, even where there is evidence both for and against the party seeking a recovery, to enter a non-suit or direct the finding of the jury. This duty the law imposes on the court when the evidence as a whole falls to show a right of recovery in the party seeking it; but to authorize an instruction as in case of a non-suit, it should appear that, admitting his testimony to be true and every inference that is fairly deducible from it, the plaintiff has still failed to support his claim.
3. Depositions—When and Upon What Conditions They May Be Read by Adverse Party.—Where a deposition has been taken by one party and filed in the cause, his adversary is entitled to use it in evidence, although the party taking it refused to introduce it in his own behalf; but it would be error to permit the reading of a part of such deposition and to refuse to compel the reading of the whole of it, if the reading of the whole be demanded by the other party.

RAMSEY WASHINGTON and HOWARD M. BENTON for appellant.

L. J. CRAWFORD and L. J. CRAWFORD, JR., for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This action was brought by the appellant, Frank Jonas, against the appellee, South Covington & Cincinnati Street Railway Company, to recover damages for personal injuries caused, as alleged, by the negligence of a conductor in charge of one of its cars. At the close of the appellant's evidence the court directed a verdict for appellee. This appeal is prosecuted from the judgment entered upon that verdict. Two grounds are urged for a reversal: (1) That the giving of the peremptory instruction directing a verdict for appellee was error; (2) that the refusal of the court to allow appellant to read part of a deposition to the jury, without reading the whole of it, was error.

The facts appear to be few and simple. The appellant, who is sixty-five years of age, and a resident of Newport, this State, boarded one of appellee's cars as a passenger in Cincinnati, for the purpose of returning to Newport. According to his evidence, when the car upon which he was a passenger crossed the bridge spanning the Ohio river between Cincinnati and Covington it stopped near the end of the bridge on the Kentucky side of the river to enable the motorman to go to appellee's ticket office, only a few feet from the railway track, for a drink of water. When the car stopped appellant, who had only a short distance further to go, alighted from it. What then followed can better be told in appellant's own language, which we here quote:

"Well, I got off of the car and had an idea of walking; I thought the car might stop a considerable time, but I had walked no more than about—well, hardly as far as the width of this room, and I seen the car started again, and when I seen that, I put myself in position to catch hold of the handle bar, but, as it happened, I missed getting a hold of it. I didn't have hold of the handle bar and wasn't dragged by the car—that's all a mistake; but the conductor got hold of my left arm and held on to me, and so, if I wanted to or not, I had to run after the car—the conductor made me. It wasn't my intention, though; I never did intend to run after the car, and, well—after plodding along a little bit that way—I forgot now exactly how far it was—maybe a couple of car lengths—then I was afraid my feet would get knocked so badly that they would be crippled up, and I holloed at the conductor to let me go, and, well—when he finally did let me go, I landed so hard that I fell and turned my left ankle. That's all there is to it, gentlemen."

By the fall he then received appellant's leg was broken. The only other evidence appearing in the record is that furnished by the deposition of George M. Jackson, who was a passenger on the car at the time of the accident. He testified as follows:

"The conductor was standing on the rear platform. The car was moving, I should judge, about eight miles an hour. I couldn't state exactly how far the car went—the motorman stopped as quick as he could, about fifty feet. \* \* \* Well, the car stopped at the end of the bridge, at the ticket office. The motorman went off to get a drink or something. The passenger got off and

started to walk, and as the car started again, the man grabbed the car and tried to get on while the car was in motion. The conductor holloed at him to let loose and tried to reach and catch him. The old man fell on the side of the car and fell on the tracks. The car dragged him. The conductor rang for the motorman to stop and the car stopped about fifty feet and backed up and gathered him up and took him to Third and Monmouth streets, to Doctor Bonar."

From the cross-examination of Jackson we quote the following questions and his answers thereto:

"Q. State exactly where you were on the car; if seated, state what seat you were in? A. I was in the last seat in the rear, left hand side. Q. Did the conductor try to assist Frank Jonas (the man who was injured) on the car? A. Yes. He tried to grab him after he had holloed to him not to catch on the car. Q. Did the conductor catch hold of Jonas? If so, how did he have hold of him? A. He did. He had hold of his arm."

It will be observed that appellant and Jackson differ in one or two material particulars. The former testified that he did not take hold of the handle bar of the car and was not dragged by the car, but that the conductor got hold of his left arm and held on to him, which compelled him to run along with the car. Jackson testified that appellant did take hold of the car and try to get on while it was in motion, and that the conductor holloed to him to let loose before he reached out and caught him by the arm. Both agree that when the conductor let appellant go he fell to the ground, in doing which he sustained the fracture of the leg. They also agree that after the conductor caught hold of appellant the car ran twice its length before being stopped, but Jackson alone testified that it was running at a speed of eight miles an hour, appellant making no statement as to its speed.

It is insisted for appellant that he was in nowise to blame for the injuries he sustained; but that they were caused by the act of the conductor in catching him by the arm and holding him until he was forced to run with the car and then turning him loose in such a way as to cause him to fall; and that these acts of the conductor constituted negligence for which appellee is liable.

Considered as a whole, appellant's own testimony conduced to prove that while it was his purpose to again

get upon the car as it passed him, he failed to grasp the handle bar and this failure ended his attempt to board the car, which would have moved on, leaving him on the bridge or ground in safety, but for the act of the conductor in catching and holding him by the arm and thereby dragging or compelling him to keep up with the car while in motion, until turned loose under such headway or momentum as to destroy his equilibrium and cause him to fall. On the other hand, according to Jackson's testimony in chief, appellant first put himself in danger by taking hold of the handle bar and attempting to get on the car while it was in motion, upon seeing which the conductor called to him to loose his hold on the car, and then attempted to prevent him from falling, by catching him by the arm, notwithstanding which attempt appellant did fall, when, in obedience to the conductor's command, he released his hold on the car.

If appellant's injuries were sustained in the manner testified by him, they were caused by the negligence of appellee's conductor. Appellant, upon leaving the car, ceased to be a passenger, and his attempt to again board the car as it passed him did not make him a passenger. The car was not then at a point where it was required or accustomed to stop to take on passengers, but had just left the ticket office, where passengers were allowed to get on and off. So, at the time of receiving his injuries appellant was a trespasser; therefore, the conductor was under no duty to render him assistance in getting on the car, but if he saw he was in danger, to use ordinary care to prevent his injuries. It was, therefore, his duty to refrain from catching hold of appellant, if such assistance, under the circumstances, served to increase appellant's danger; and, according to the latter's version of the transaction, the conductor by taking hold of his arm and continuing to hold it, not only increased, but wholly caused, the danger which resulted in his injuries. In this view of the matter the act of the conductor in catching and holding appellant was negligence. On the other hand, if, as Jackson's testimony conduced to show, the conductor did not catch or hold appellant until after he had grasped the car and failed to let it go when commanded by the conductor to do so; that such holding of appellant's arm by the conductor did not produce his injuries, but that they were alone caused by his holding to and being dragged by

the car, it may well be said that they resulted from his own negligence, or that such negligence so contributed thereto that but for same he would not have been injured.

In view of the plea of contributory negligence interposed by appellee's answer and the conflicting character of the evidence, the case should have been submitted to the decision of a jury, under instructions properly presenting the issues between the parties. What is and what is not negligence in a particular case is generally a question for the jury and not for the court. The rule is that where the facts are such that there is room for honest difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inferences is for the jury. Therefore, whenever it is necessary to determine what a man of ordinary care and prudence would be likely to do in the emergency shown, involving, as it generally does, more or less of inference or conjecture, it should be settled by a jury. A satisfactory statement of the rule in question will be found in *C., N. O. & T. P. Ry. Co. v. Rue*, 142 Ky., 694:

"It is the province of a jury to pass upon and decide questions of evidence; and especially is this so if the evidence is contradictory or conflicting; but it sometimes becomes the duty of the trial court, even where there is evidence both for and against the party seeking a recovery, to enter a non-suit or direct the finding of the jury. This duty the law imposes on the court when the evidence as a whole fails to show a right of recovery in the party seeking it; or, to explain our meaning in language employed by this court: 'To authorize an instruction as in case of a non-suit, it should appear that, admitting his testimony to be true, and every inference that is fairly deducible from it, the plaintiff has still failed to support his claim.' *Shay v. R. & L. T. P. Co.*, 1 Bush, 108; *Morris' Admr. v. L. & N. R. Co.*, 22 R., 1593."

It follows from what has been said that the circuit court erred in granting the peremptory instruction directing a verdict for the appellee.

Appellant's second and final contention, that the court's refusal to permit him to read a part of George M. Jackson's deposition to the jury without reading the whole of it was error, is without merit. It appears that

Jackson's deposition was taken by appellee in Los Angeles, California, his place of residence. On the trial and before the introduction of appellant's evidence, appellee's counsel advised his counsel and the court that it would not introduce or read Jackson's deposition. After testifying himself as a witness, appellant offered to read to the jury that part of Jackson's deposition containing the questions asked him on cross-examination and his answers thereto, to which appellee objected, unless he would read the whole of the deposition. The court sustained the objection and ruled that appellant could not read the cross-examination without reading the whole of the deposition. Appellant excepted to this ruling, but read the whole of the deposition.

It appears to have been repeatedly held by this court that when a party takes a deposition and files it, and declines to read it, the adverse party has the right to read the deposition. *Musick v. Ray*, 3 Met., 427; *Weil v. Silverstone*, 6 Bush, 698; *Sullivan v. Norris*, 8 Bush, 519. But we have been unable to find, nor have we been referred to, any case in which the court has passed on the question whether the party has the right to use a part of the deposition taken by his adversary, without introducing it as a whole. In 13 Cyc., 983, it is said:

"The question whether a party has a right to use only a part of the deposition or must introduce it as a whole is one upon which the courts have not been uniform in their decisions. In some cases the courts have allowed the deposition to be read in part, leaving the remainder to be read by the adverse party if he so desires; but the better rule seems to be that a part of a deposition cannot be read and part omitted, but the entire deposition competent and pertinent to the issues involved should be read; and especially is this so where a party introduces a deposition taken in his own behalf. Where a party reads in evidence a part of a deposition taken at the instance of his adversary, he thereby makes it his own testimony to the same extent as if he had taken it, and his adversary is entitled to read the whole."

The foot notes following the above statement of the law contain numerous cases in other jurisdictions holding that it is error to permit the reading of a part of a deposition and to refuse to compel the party reading it to read the whole on demand of the adverse party. *State v. Raburn*, 31 Mo. App., 385; *U. S. Trust Co. v.*

Lanahan, 58 N. J. Eq., 796; Miles v. Stevens, 3 Pa. St., 21; Grant v. Pendery, 15 Kans., 236; Kilbourn v. Jennings, 40 Iowa, 473; Norris v. Brunswick, 73 Mo., 256; Hamilton-Brown Shoe Co. v. Milliken, 52 Neb., 116; Barton v. Morris, 15 N. Car., 240.

In view of the foregoing authorities, we think it safe to say that where a deposition has been taken by one party and filed in the cause, his adversary is entitled to use it in evidence, although the party taking it refuses to introduce it in his own behalf; but while this is so, it would be error to permit the reading of a part of a deposition and to refuse to compel the party reading it to read the whole, if demanded by the adverse party. There was no error in the ruling of the trial court requiring appellant to read the whole of Jackson's deposition.

For the reasons indicated the judgment is reversed and cause remanded for a new trial in conformity to the opinion. Whole court sitting.

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### **Fox v. Lantrip, et al.**

(Decided January 15, 1915.)

#### **Appeal from Hopkins Circuit Court.**

1. **Officers—Salary of County Officer—Duty of Fiscal Court.**—Where the salary of a county officer is to be paid by a county, it is the duty of the Fiscal Court to fix the salary of such officer for each year of his term, by a general order made previous to his election.
2. **Officers—Salary of County Officer.**—If the Fiscal Court fails to fix the salary of an officer before his election to the term, it can do so by an order made after his election, or qualification.
3. **Officers—Where Salary of County Officer Is Not Fixed Before His Term—Power of Fiscal Court—Gross Sum Allowed.**—Where the fiscal court has failed to fix the salary of a county officer before his election, by a general order, and for the first year of his service allowed him a gross sum, a like sum will be considered his salary for each of the years of his term thereafter, and the fiscal court has no power to increase or lessen it for any of the succeeding years of his term, provided such sum is within the maximum and minimum amounts provided by law.
4. **Officers—To Ascertain Salary of School Superintendent, Where Gross Sum Is Allowed for First Year.**—Where there has



been no order made by the fiscal court fixing the salary of the County Superintendent of Schools before his election, and he is allowed by said court a gross sum for the first year's service of his term, the gross sum divided by the number of pupil children reported by the census in the county, will ascertain the amount per capita for each pupil child, and will be a basis upon which to ascertain his salary for the succeeding years of his term.

5. Fiscal Courts—Order of Fiscal Court.—An order of a Fiscal Court which was never read publicly by the clerk, nor signed by the county or presiding judge, with the approval of the justices present, is not a valid order for any purpose.

H. F. S. BAILEY for appellant.

MILTON CLARK and C. A. DENNY for appellees.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

On the 24th day of August, 1914, the appellees, G. W. Lantrip, and others associated with him, as plaintiffs, filed a petition in ordinary in the Hopkins Circuit Court against the appellants, A. J. Fox, the County Judge of Hopkins county, and the justices of the peace of said county, in which they substantially alleged that the appellant was the School Superintendent of Hopkins county for the term beginning on the first Monday in January, 1910, and ending on the first Monday in January, 1914; that at the regular term of the Hopkins County Fiscal Court, held in October, 1909, and on the 19th day of October, 1909, the fiscal court, by an order duly made and entered in court at that time, fixed the salary of the school superintendent of the county for the ensuing four year term, which was held by the appellant, at ten cents per pupil child, as shown by the school census reports for each year in the county; that at the April term, 1910, of the fiscal court, the fiscal court made an order changing the salary of the county school superintendent from ten cents per pupil child to \$1,500.00 per year, and thereafter the appellant was paid for his services as superintendent of schools the sum of \$1,500.00 per year for the years 1910, 1911, 1912, and 1913; that the \$1,500.00 exceeded the amount to which the superintendent's salary amounted to at ten cents per pupil child for each of the years as follows, namely: For the year 1910, \$473.20; for the year 1911, \$452.60; for the year 1912, \$450.80; and for the year 1913, \$467.80; making in all the sum allowed and paid to him by the fiscal court for

said years the sum of \$1,844.40 in excess of what his salary would have amounted to at ten cents per pupil child for the years in accordance with the order made on the 19th day of October, 1909, fixing the salary of the school superintendent. The petition further alleges that each of the plaintiffs was a citizen and taxpayer of Hopkins county, Kentucky; that the citizenship of the county was numerous, and asked that they be permitted to sue for and on behalf of all of the taxpayers of the county; that they had theretofore demanded in writing of the fiscal court that it sue the appellant for the sums of money which, as alleged, he had received from the county in excess of what his salary amounted to at ten cents per pupil child, but that said court had failed and neglected to cause such a suit to be instituted, and had made no effort to collect said sums, or any of them, from the appellant, and prayed a judgment against the appellant for the sum of \$1,844.40, with interest, and for their costs. They did not ask for any recovery against the county judge or the justices of the peace.

Thereafter the appellees filed two amended petitions, the first of which seems to have been filed for the purpose of making Hopkins county a party defendant, and the second amended petition only set out and alleged the amount of taxable property owned by each of the plaintiffs in Hopkins county.

The appellant entered a general demurrer to the original petition, and as amended, which demurrer being overruled by the court, the appellant excepted. We concur with the opinion of the circuit court in overruling the demurrer, for, while in the original petitions and in the amendments much is stated which is not necessary in order to constitute a good cause of action against the appellant, but the things alleged therein do make a good cause of action on the part of the plaintiffs against the appellant, A. J. Fox.

No recovery was asked against any of the defendants except Fox, in either of the amended petitions, and neither of the defendants appeared or entered any defense to this action, except the appellant. In due course of time the appellant filed his answer, in which he traversed the allegations of the petition, and denied that he had wrongfully, or unlawfully, or without warrant of law, drawn or received from the public funds of the

county the sum of \$1,844.40, or any other sum, as salary for his services as county school superintendent; or that at the regular October term, 1909, his salary had, by an order of the fiscal court of Hopkins county, been fixed for the ensuing four year term to which he was elected at the sum of ten cents per pupil child within the school age, as shown by the census reports for each year, or that any order had been made or entered at the October term, 1909, of the fiscal court fixing his salary at any sum, or that at the regular April term, 1910, of the fiscal court of the county it had attempted to change the salary of the county school superintendent from ten cents per pupil child to \$1,500.00 per year, or any other sum, or that he drew from the county funds as salary the sum of \$473.20, or any other sum, in excess of his salary for the year 1910, or for either the year 1911, 1912, or 1913, or that he drew from the treasury, or was paid by the county, as his salary, the sums alleged in the petition, or any other sum, in excess of his salary fixed by law for either of said years. He further denied that there was any excess of salary paid him amounting to \$1,844.40, or any sum, and denied that the fiscal court had by an order fixed the amount of his salary previous to his election, at the October term, 1909, or at any other time, or that an order had thereafter been made changing the order fixing his salary, or that any order was thereafter made, fixing the salary of the county superintendent, until November 16, 1909. This was the substance of the allegations contained in the first paragraph of the answer, which seems to have made an issue, and upon which the court was obliged to have heard proof before rendering any judgment against the appellant. By the second paragraph of the appellant's answer, the appellant alleged that he was elected school superintendent at the regular November election, 1909, for a four year term, beginning on the first Monday in January, 1910; that he qualified as required by law, and held the office during said term; that at the time of his election the fiscal court of the county had not made any order fixing the salary which he should receive for his services for the years composing his term, but that the order was made on the 16th day of November, 1909; that the fiscal court met on October 19th, 1909, and held a session upon that day, but that there was no order made or entered by them

at that time; that the clerk of the county court, who is also clerk of the fiscal court, made minutes of the proceedings in pencil on the temporary minute book of the Hopkins County Court, and that such minutes were never read in open court, or approved or signed by the county judge in the presence of the other members of the court; that the court then adjourned to meet on November 6th, 1909, and that on or about the last named day the clerk of the fiscal court for the first time entered the orders of the meeting held on October 19th on the order book of the court, and in doing so, entered the order fixing the salary of the school superintendent different from the minute made and different from the resolution of the court; that the only minute the clerk made with reference to the salary of the school superintendent on October 19th, 1909, was as follows: "Ordered that Supt. salary be fixed for yr. 1910," and that the clerk thereafter, about November 16th, 1909, wrote out upon the order book an order with reference to his salary in which the salary of the county superintendent was fixed at ten cents per pupil child reported in each year in the school census as his salary per annum, and further alleged that the record of the meeting of the court on October 19th, 1909, did not show by whom the court was held; that when court met pursuant to adjournment on November 16, 1909, the fiscal court then made an order, which was entered, read, approved and signed, by which it set aside the order spread upon the order book by the clerk as if made on October 19, 1909, and then proceeded, by an order duly made, entered, approved and signed, to fix the salary of the school superintendent for the ensuing four years, and that this defendant received said salary for each of the four years, and no more.

There are some other allegations in the answer which we do not deem necessary to mention, as they constitute no defense to the action.

The appellees demurred generally to the answer of the appellant, and, upon a hearing, the court sustained the demurrer, and the defendant declining to plead further or amend his answer, and announcing his purpose to abide by his answer, the court rendered a judgment against the appellant in favor of the appellees, for the use and benefit of Hopkins county, for the sum of \$1,844.40, and the appellees' costs expended.

The appellant took proper exceptions to the judgment of the court sustaining the demurrer, and to the judgment of the court adjudging that the appellees recover said sum against him, and prayed an appeal to this court, which was granted.

Neither the appellees nor the appellant filed with their pleadings copies of the orders referred to therein, but no objection was made to this in the court below, nor was any motion made by either party requiring them to be filed with their pleadings.

It seems that the only question for determination by this court is as to whether or not, assuming the allegations and denials in defendant's answer to be true, they constituted a defense to the things alleged in the petition.

Section 161 of the Constitution provides as follows: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed."

Section 235 of the Constitution is as follows: "The salaries of public officers shall not be changed during the term for which they were elected; but it shall be the duty of the General Assembly to regulate by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly." The contention of appellant that the office of school superintendent, not being one created by the constitution, that these constitutional provisions do not apply to him. The foregoing provisions are very broad in their terms, and the school superintendent is a county officer, and this court has held in the cases of *Piercy v. Smith* (117 Ky., 990), and *Breathitt County v. Noble* (117 S. W., 777), that these sections of the Constitution are applicable to the office of school superintendent. There can be no question that it applies to and controls the compensation of all county officers, and an officer is any one who is "invested with some portion of the function of the government to be exercised for the public benefit." *City of Louisville v. Wilson* (99 Ky., 599.)

In construing these sections of the Constitution, *supra*, this court has held that where it devolves upon the fiscal court of a county to fix the salary of any county officer, it is the duty of the court, by an order, entered

before the election of the officer, to fix the salary for each of the years during the term for which he holds the office, but, if the fiscal court should fail to do so, it may, by an order, fix the salary after the qualification of the officer, and while he is in office, and we know of no reason why, if the salary of an officer had not been theretofore fixed by an order of the court, it should not do so after his election and before his qualification. In the following cases this court has held that the salary may be fixed after the officer has qualified and after the commencement of his term, viz: Marion County v. Kelly (112 Ky., 831); Barrett v. City of Falmouth (109 Ky., 151); Jefferson County v. Waters (114 Ky., 48); Butler County v. James (116 Ky., 575). It has also been determined by this court that when the salary of a county officer for the ensuing years of his term is fixed by an order of the fiscal court previous to his election, that the fiscal court has no power to change his compensation, making it either greater or less, after his election. This seems to be a mere declaration of the plain provisions of the sections of the Constitution above quoted. Further construing this section, this court has held that where, after the election and qualification of an officer, and where the court has not theretofore fixed his salary by an order, and it proceeds to make an order paying him for his first year's services in his term of office, that should be considered as the salary fixed for him and it cannot, for the following years, be either added to or lessened in amount. (Butler County v. James, 116 Ky., 575.) It was likewise held by this court in the case of Breathitt County v. Noble, *supra*, that, in as much as the statute, Section 4419, Kentucky Statutes, 1903, provides that the salary of a county superintendent shall not be less than eight cents nor more than twenty cents per pupil child reported in the county, and where the fiscal court, not having fixed the salary of the county superintendent previous to his election, shall, by an order made after his election, allow him a gross sum for his services for the first year of his term, the basis of his salary for the future years of his term can be ascertained by dividing the sum by the number of pupil children in the county, and thus find the amount per pupil child allowed him, and in that way ascertain the amount per pupil child which he shall receive as his salary, provided the salary in gross is not less than the

minimum nor more than the maximum sum, which, by law, a superintendent of schools may be paid as his salary. The maximum sum which could lawfully be paid to a school superintendent for his salary at the time of the election and qualification of appellant was \$1,500.00. (Section 4419, Kentucky Statutes, 1903 edition.)

The answer of the appellant fails to deny that he was paid the sum of \$1,500.00 a year as his salary, and, taking the other allegations in the petition, which are un-denied, it is apparent that said sum did not exceed twenty cents per pupil child in said county for each of the years the appellant held the office of school superintendent, and hence the fiscal court could lawfully allow and pay appellant not exceeding said sum per year as his salary.

If the fiscal court had not, by an order made previous to his election, fixed the amount of the salary which he should receive per year for his entire term, then the fiscal court was within its authority when it allowed him the sum of \$1,500.00 for the first year of his term, and did not allow him more than that for each of the ensuing years of his term. The only question then to be determined from the answer is as to whether or not the fiscal court had, before the election of appellant, by a general order, fixed his salary for each year of his term.

The fiscal court is one of the courts provided for in the Constitution of the State, and is given charge and direction of the fiscal affairs of the county. By the statutes of this State it is required to be a court of record, and it speaks only by its records, and cannot do otherwise. A mere meeting together of the persons composing the membership of the fiscal court, and determining in parol as to what they are to do and not to do, is not an act of said court. (Talbot v. Marshall, 2 Mar., 603; McDonald v. Franklin Co., 125 Ky., 205, 100 S. W., 861.)

Section 1842 of the Kentucky Statutes is as follows:

"Before each adjournment the minutes of the proceedings of the said court shall be read publicly by the clerk of the court, and corrected if necessary, and the same shall be signed by the county judge or the presiding judge, with the approval of the justices of the peace present when the court was held."

Section 1843 of the Kentucky Statutes is as follows:

"No minute or order of the fiscal court shall be valid until the same shall be read and signed as aforesaid, nor unless the record shows by whom the court was held."

The answer of the appellant discloses that a meeting of the fiscal court was held on the 19th day of October, 1909, and at that session no minutes of its proceedings were publicly read by the clerk of the court, neither were they corrected, neither were same signed by the county judge or the presiding judge, with the approval of the justices of the peace present when the session was held, neither does the record of that meeting show by whom the court was held. The memorandum made by the clerk in pencil on his minute book is as follows: "Ordered that Supt. salary be fixed for yr. 1910," is not an order for any purpose and only shows that the court at that time resolved to fix the salary of the superintendent of schools, either then or at some future time. This memorandum was not read publicly, nor signed by the county judge in the presence of the justices present. If there was no order showing who composed the court at that time, and the court did actually adjourn at that time and any minutes made of its proceedings were neither read nor signed, as required by statute, *supra*, it is very apparent that no valid act was done by the court at that time.

The answer of the defendant alleges that the court was in regular session on the 19th day of October, 1909, and adjourned to meet on the 16th day of November, 1909, and that both meetings were a part of the same term, and that on the 16th day of November, 1909, or previous thereto, the clerk wrote out an order on the order book of the fiscal court fixing the salary of the school superintendent at ten cents per pupil child in the county per year, but this act of the clerk could not be construed as an act of the court until said order was read over publicly, approved and corrected, if need be, and signed by the county judge in the presence of the justices of the peace present who made the order. It does not appear that it was ever approved in this way, but, instead, the court at its adjourned term, November 16th, 1909, refused to approve said order, and made an order setting it aside, and thereupon, for the first time, made an order fixing the salary of the school superintendent at \$1,500.00 per year for the ensuing four years. In fact, it does not seem that there was any necessity for the court, at its term held on the 16th day of November, to make any order rescinding or setting aside the order put upon the order book by the clerk, since it had no validity.



It was held in the cases of *Dye v. Knox* (1 Bibb, 575), and in *Garrard County v. McKee* (11 Bush, 234), that county courts "have power to adjourn from day to day, but they are not required to adjourn each day when they cease to transact business; they may, if they see proper, treat the entire time they are in session as one day, and meet and sign one adjourning order." If a mere minute was made by the clerk of the so-called order of the court made on the 19th day of October, 1909, and was never read over, approved, nor signed by the county judge or presiding judge in the presence of the justices, but was thereafter written out by the clerk upon the order book, and at the adjourned term of the court, held on November 16, 1909, it was not approved, but, instead, was set aside, and corrected and an order then entered fixing the salary of the superintendent, it would be immaterial whether the court adjourned on October 19th and entered an adjourning order at that time and met again on November 16th, or whether they failed to adjourn on October 19th, and treated that day and November 16th as one day, as the order was not entered, read, approved, or signed on October 19th, and could have no validity until same was done, and the reading, disapproving, and correcting it, or setting it aside, as alleged in the answer, and making an order to conform with the wishes of the court on the 16th day of November, can only be considered as an act done on November 16th, which was after the election of appellant, and seems, from the allegations of the answer, to have been the only valid order made upon the subject. The answer, however, alleges that there was an adjournment of the court upon October 19th, and, if such was the case, the order written by the clerk, as if made on October 19th, has no validity whatever. If no adjourning order was made of the court on October 19th, and said day and November 16th were considered as one day, still the order, if any, made on October 19th, and thereafter spread upon the records by the clerk, although it may have been in the terms directed by the court, it still lacks the essentials necessary to its validity, in that it was never approved by the justices composing the court, nor signed by the presiding judge.

An order or a judgment of a court of record never has any validity until it is signed by the authority designated by law for that purpose. (Commonwealth of

Kentucky v. Chambers, 1 J. J. Mar., 108; May v. Duncan, 157 Ky., 586; Interstate Petroleum Co. v. Farris et al., 159 Ky., 820.) Assuming that the allegations and denials of the answer are true, and taking them altogether, there was no order made by the fiscal court fixing the salary of the appellant until after his election, and until the 16th day of November, 1909, and that on that day the fiscal court did make an order fixing his salary for each year of the term, within the minimum and maximum amounts allowed by law, and if the payment to him of said \$1,500.00 per year did not in any one or more of the three last years of his term increase the amount paid him per pupil child over the amount he received per pupil child for the year 1910, his answer presents a complete defense to the petition, but if, on account of the change in the number of pupil children in the county, the \$1,500.00 amounted to more in either of the three last years of his term than the amount paid him per capita of the pupil children for the year 1910, then his answer presents a defense against the recovery against him of such part of the amounts sued for as may be necessary to make his compensation per pupil child the same as during the first year of his term.

It is, therefore, adjudged that the judgment appealed from be reversed and this cause is remanded to the court below with directions to set aside the judgment, and the judgment sustaining the demurrer to the answer of appellant, and to overrule said demurrer, and for proceedings in conformity to this opinion.

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### Deacon v. Commonwealth.

(Decided January 15, 1915.)

#### Appeal from Bullitt Circuit Court.

1. Evidence—Spontaneous Exclamations—Res Gestae—Time of Utterance.—Deceased was engaged in a fight at a ball game. Defendant approached and struck him with a baseball bat, fracturing his skull. Deceased was rendered immediately unconscious. He was carried a few feet away, and immediately on regaining consciousness, asked "Who hit me?" Held, that the exclamation was as much a part of the occurrence or transaction as if it had been made the very moment after he was struck, and was therefore properly admitted in evidence as a part of the res gestae.

2. **Evidence—Statement of Fact.**—On a trial for homicide, the question whether or not the deceased saw the defendant at the time he was struck, called for a statement of fact, and not a mere opinion or conclusion on the part of the witnesses.
3. **Evidence—Homicide—Character of Deceased.**—On a trial for homicide, where the bad reputation of the deceased for peace and quiet was established by uncontroverted evidence of two witnesses, it was not prejudicial error to refuse evidence tending to establish his bad reputation for peace and quiet eight or ten years before the homicide.
4. **Criminal Law—Homicide—Self Defense—Instruction.**—On a trial for homicide, an instruction which required the jury to acquit the defendant if they believed from the evidence that the defendant “believed and had reasonable grounds to believe he was then and there in danger of loss of life or of receiving great bodily injury at the hands of said Nell, and that it was necessary, or believed by the defendant in the exercise of a reasonable judgment to be necessary, to strike said Nell, etc.,” held not subject to complaint.
5. **Trial—Separation of Jury.**—Where the sheriff and one member of the panel were seen standing about thirty-five feet from the rest of the jury, engaged in conversation, held that such separation was not prejudicial in the absence of a showing that they were discussing the case, or that any member of the jury spoke to or was addressed by any outsider.

NAT W. HALSTEAD, J. F. COMBS and T. C. CARROLL for appellant.

JAMES GARNETT, Attorney General, and ROBERT T. CALDWELL, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Appellant, Herman Deacon, who was convicted of the murder of Robert Nell, and given a life sentence, seeks a reversal of the judgment on several grounds.

The facts are these: Appellant had been paying attention to Mrs. Cravens, a daughter of Nell. On April 6, 1913, appellant went to Nell's home in company with Mrs. Cravens and a Miss VanMeter. After ordering his daughter into the house, Nell cursed and assaulted appellant and ran him off the premises. At the same time he threatened to kill appellant. Later on he manifested hostility towards appellant both at a public sale and at a ball game. He also, in the presence of others, threatened appellant's life. These threats were communicated to appellant. About two weeks before the homicide appellant, according to the evidence of Mrs. Cravens and a Miss Hagan, said that if Nell fooled with him

he would either kill or knock him in the head. Someone had previously asked what would Mr. Nell do if he knew his daughter came with appellant. Appellant's statement was in response to this remark. Appellant denied having made the statement. The homicide took place on Saturday, June 14, 1913. A ball game was in progress between the Lenore team of Nelson county and the Fancy team of Bullitt county. The game was being played on the latter's grounds, near the county line. Nell, as the representative of Bullitt county, was umpiring the bases, while Bud Roby, of Nelson county, was umpiring the balls and strikes. Appellant was a substitute on the Nelson county team. According to the evidence for appellant, Nell had been drinking considerably, and was not, therefore, in condition to umpire with that precision and impartiality which the circumstances required. It was not long before Nell became involved in numerous disputes and altercations. Finally, Jones, of the Lenore team, made some remark indicating very clearly what he thought of Nell as an umpire. Nell lost his temper and began to curse and abuse Jones. Pretty soon he and Jones began fighting. At this time appellant was several feet away. After Nell and Jones had struck several licks, a man by the name of Clark stepped between them and, catching Nell by the arms, began pushing him backwards. At that time appellant was approaching from the rear. When appellant got near enough he struck Nell with a baseball bat and fractured his skull. The blow was struck over the shoulders of a man by the name of Terry. It was further shown by the evidence for the Commonwealth that no conversation passed between appellant and Nell, nor did Nell make any demonstration towards appellant. When appellant was struck he fell to the ground. He was afterwards moved a few feet away. When he regained consciousness he immediately asked, "Who hit me?" According to the witnesses for the Commonwealth, from three to five minutes had elapsed between the blow and the making of this remark. According to the witnesses for the appellant, the time was from five to ten minutes.

According to the evidence for appellant, he had been sitting on a baseball bat. When the difficulty arose he approached the combatants. After two or three blows had been struck by Jones and Nell Clark shoved Nell back. Appellant was standing to the right of Nell. Nell

was dodging first to one side and then the other, in an effort to pass Clark and get to Jones. When Nell reached appellant he threw his left hand against Clark's breast and shoved him back. He then turned his face towards appellant, and, with a very determined expression on his face, said, "What the hell have you got to do with it?" He then ran his hand into his pocket and appellant struck him. Appellant struck him a left-handed lick. He had no intention of killing appellant, but struck him to keep from getting hurt. Nell's skull was fractured behind his right ear. At the time of the tragedy appellant was 22 years old, and had always borne a good reputation.

It is first insisted that the court erred in admitting in evidence the question, "Who hit me?" asked by the decedent on his return to consciousness a few minutes after he was struck. The admission of statements as part of the *res gestae* depends, not so much on the question of time as on the question whether or not there was an opportunity to contrive and misrepresent, and whether or not the nervous excitement produced by the event may still be supposed to predominate, and the reflective powers of the mind be in abeyance. The statements need not be strictly contemporaneous with the exciting cause. They may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and be dissipated. Wigmore on Evidence, Sec. 1750. Hence, it is the rule to admit as parts of the *res gestae* not only such declarations as accompany the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they were the result of premeditation or design. It has been held in a number of cases that the first exclamations of returning consciousness are spontaneous, and therefore admissible even after a considerable interval. Thus, in the case of *Johnson v. State of Ga.*, 65 Ga., 94, it was held that what the person assaulted said, though half unconsciously, so soon as she was found on the day of the assault, at the moment of the restoration of sensibility, was a part of the *res gestae*, and therefore admissible. In the case of *State v. Ripley*, 32 Wash., 182, the prosecuting witness made certain statements after the rob-

bery occurred. The evidence showed that he was knocked down and dragged in an unconscious condition from that place to the edge of the sidewalk in front of a saloon. On being aroused from unconsciousness the statements were made. It was held that the statements were admissible, though made in the absence of the accused, and that the weight to be attached to them because of the mental condition of the prosecuting witness was for the jury to determine. In the case of *Christopherson v. Chicago, M. & St. P. R. Co.*, 135 Iowa, 409, 124 Am. St. Rep., 284, 109 N. W., 1077, a foreman was run down by a switch engine as he was going on the track to the tool house. His statement that he was going under orders of the roadmaster, made immediately on his restoration to consciousness, though some time after the accident, was admitted as a part of the *res gestae*. In the case of *Hinzeman v. Missouri P. R. Co.*, 182 Mo., 621, 81 S. W., 1134, a track hand was struck by a train. On regaining consciousness he said, "What hit me?" The statement was admitted as tending to show that he had not seen the train before he was struck. In the case of *Sutton v. Southern R. Co.*, 82 S. C., 345, 64 S. E., 401, a passenger was injured in a rear-end collision. Statements as to his condition made immediately upon his being restored to consciousness were held admissible as a part of the *res gestae*. In the case of *Paris & G. N. R. Co. v. Calvin*, — Tex. Civ. App., —, 103 S. W., 428, affirmed in 101 Tex., 291, 106 S. W., 879, a horse was frightened by a whistle from an engine at a crossing and ran away, colliding with the train. As soon as one of the party regained consciousness she stated that the whistle was not blown for the crossing, but at the crossing, frightening the horse. This statement was held *res gestae*, and admissible. In the case of *M., K. & T. R. Co. v. Moore*, 24 Tex. Civ. App., 489, 59 S. W., 282, the declaration of an injured brakeman, immediately on regaining consciousness, to the effect that "the hand hold gave way," was held admissible as a part of the *res gestae*. In the case of *Ft. Worth & D. C. R. Co. v. Partin*, 33 Tex. Civ. App., 173, 76 S. W., 236, a declaration by the injured party, immediately after becoming conscious, though twenty minutes after the accident occurred, was admitted as a part of the *res gestae*. In the case of *Ritter v. Griswold* (Ala.), 56 So., 860, a witness, who had been assaulted, asked, immediately

upon regaining consciousness, what had happened. The statement was held properly admitted as a part of the *res gestae*. And in the case of Britton v. Washington Water Power Co., 59 Wash., 440, 33 L. R. A. (n. s.), 109, 140 Am. St. Rep., 858, 110 Pac., 20, a statement by a boy claiming to have been kicked from a trolley car while stealing a ride, made eight days after the accident, as soon as he regained consciousness, was held to be a part of the *res gestae*. In discussing the question the court said:

“There had been no opportunity for reflection or deliberation. They were as much a part of the occurrence as if they had been made when the boy was raised from the street, immediately after falling. So far as he was concerned, there was no conscious intervening time between the injury and the declaration.”

In the case of Bionto v. Illinois C. R. Co., 125 La., 147, 27 L. R. A. (n. s.), 1030, 51 So., 98, the statements of a boy killed by a train, made after recovering consciousness, were held inadmissible. There, however, the boy was entirely conscious when found, and the circumstances showed that he had been conscious some time. That being true, there was an opportunity for reflection; and the case does not conflict with the cases above cited.

In the case under consideration, the deceased was struck and immediately rendered unconscious. He was carried just a few feet away, and, immediately on regaining consciousness, asked, “Who hit me?” The exciting influence had not lost its sway. There was no opportunity for him to contrive and misrepresent. The exclamation was as much a part of the occurrence or transaction as if it had been made the very moment after he was struck. It was, therefore, properly admitted as a part of the *res gestae*.

The Commonwealth introduced several witnesses to rebut the statement of the accused that the decedent turned his face towards him, and, with a very determined expression on his face, said, “What the hell have you got to do with it?” When these witnesses were examined in chief the position of the parties was not clearly brought before the jury. When the accused stated that the decedent turned his face toward him and made a hostile demonstration, accompanied by the remark above quoted, it was certainly within the sound discretion of the trial court to permit these witnesses,

though they had been examined in chief, to rebut the statement thus made. The chief complaint of their testimony in rebuttal grows out of the contention that these witnesses did not testify to facts, but merely expressed an opinion. Witness Clark was asked the question in the following form: "Mr. Clark, at the time of this trouble, just before Deacon struck Bob Nell, did Bob Nell turn and face Jack Deacon and say to him, 'What the hell have you got to do with this?' and throw his hands behind him?" The question was asked of other witnesses in the following form: "Was he (Nell) looking at Deacon at all, or did he see him before he struck him with that bat?" In some instances the question was asked in the following form: "Did Bob Nell see Jack Deacon at all when he hit him?" It is in the latter form that the question is particularly objected to, on the ground that the question whether or not Nell saw the accused was not a fact about which the witnesses could testify, but called for a mere expression of opinion. It seems to us that this distinction is more metaphysical than substantial. While metaphysicians may dispute as to the actual existence of external matter, and as to whether or not its existence may be directly apprehended by the eye or is founded on a process of generalization based on particular experiences, we take it that in law external matter actually exists, and may be seen by the eye. Here the accused was within a very short distance of the deceased. The deceased was not blind. If the deceased looked at the accused he necessarily saw him. That the accused may have been within the range of his vision, and that the deceased might have seen him by turning his eyes at an angle, was not the question in dispute. The accused said that the deceased turned his face towards him. The purpose of the evidence objected to was to show the contrary. Under these circumstances the question, "Did Bob Nell see Jack Deacon at all when he hit him?" called for a statement of fact and not a mere opinion or conclusion on the part of the witnesses.

It is next insisted that the trial court erred in excluding certain evidence with reference to the bad reputation of the deceased for peace and quiet. It appears that defendant offered two witnesses who fully qualified and stated that the reputation of the deceased as a turbulent, violent and dangerous man, especially when



drinking, was bad. Several other witnesses testified that about eight or ten years prior to the homicide the deceased lived in their county, and that his reputation there for peace and quiet was bad. This evidence was excluded. They did not know what his reputation was since that time. It is argued that as defendant proved the bad reputation of the deceased covering a period of about 25 years, and brought it up to the time of the homicide, it was error to exclude the evidence of the other witnesses who had known deceased's bad reputation several years before the homicide. The trial judge excluded that evidence on the ground that it was too remote. Without passing on the question of its admissibility, it is sufficient to say that we are unable to perceive how its rejection was prejudicial under the facts of this case. The bad reputation of the deceased for peace and quiet was shown by two witnesses. The Commonwealth did not undertake to show the contrary. His bad reputation being thus established by evidence that was in no way rebutted, it was not prejudicial error to refuse evidence tending to establish his bad reputation for peace and quiet eight or ten years before the homicide.

Still another ground urged for reversal is error in the instruction on self-defense. That instruction is as follows:

"If you believe from the evidence that at the time he struck R. P. Nell with a baseball bat (if he did so), the defendant believed, and had reasonable grounds to believe, he was then and there in danger of loss of life or of receiving great bodily injury at the hands of said Nell, and that it was necessary, or believed by the defendant in the exercise of a reasonable judgment to be necessary, to strike said Nell with a baseball bat in order to avert that danger, real or to the defendant apparent, then you should find defendant not guilty, on the ground of self-defense and apparent necessity; on the other hand, if you believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, when he did not believe, or did not have reasonable grounds to believe, that his life or person were in danger at the hands of said Nell, did first wilfully and voluntarily assault said Nell with a baseball bat, and in so doing make the harm or danger to himself, if any there was, necessary or apparently necessary or excusable on the part of Nell in his own necessary self-defense, you should not in that

event excuse the defendant on the ground of self-defense."

In a case like this there are two questions on which the accused is entitled to exercise his own judgment: (1) The danger; (2) the necessity for killing the deceased in order to avert such danger. It frequently happens that one or the other of these questions is left solely to the determination of the jury, and instructions which so provide are held erroneous. Thus, in the case of *Sizemore v. Commonwealth*, 158 Ky., 492, the self-defense instruction required the jury to believe "that the defendant was in danger of death or the infliction of some great bodily harm at the hands of Grant North," instead of making the question depend on whether or not defendant believed and had reasonable grounds to believe that he was then and there in danger of death or the infliction of some great bodily harm, etc., and the instruction was therefore condemned. In the case of *Austin v. Commonwealth*, 28 Ky. L. R., 1087, the instruction was proper in requiring the jury to believe from the evidence that "the defendant believed, and had reasonable grounds to believe, that he was in impending danger of death or great bodily harm at the hands of his assailant," but was held erroneous because it further provided "and that he had no means of avoiding such danger or apparent danger," thus leaving to the jury the determination of the latter question instead of making it depend on the belief of the accused. The instruction in this case is complained of because of the use of the clause "and that it was necessary," as applied to averting the danger. If this clause alone had been used the instruction would have been subject to the objection pointed out in the case of *Austin v. Commonwealth*, *supra*. However, the instruction does not stop with the words complained of. It goes further and adds the following words: "or believed by the defendant in the exercise of a reasonable judgment to be necessary to strike said Nell," etc. As the necessity for striking the deceased in order to avert the danger was not made an actual necessity to be determined by the jury alone, but the defendant was given the right of self-defense, not only under that state of case, but also in the event of his belief, in the exercise of a reasonable judgment, that it was necessary to strike the deceased in order to avert the danger, real or to the defendant apparent, it follows that the instruction is not subject to complaint.

Lastly, it is insisted that defendant was prejudiced by the separation of the jury. Several affiants say they saw the sheriff who was in charge of the jury and one member of the panel standing about thirty-five feet away from the rest of the jury, engaged in conversation. Not only is there no claim that the sheriff and the jurymen were improperly discussing the case, but the sheriff's affidavit to the effect that he did not in any manner discuss the case with the jurymen in question, or any other member of the panel, stands uncontroverted. Nor does it appear that on the occasion in question any member of the jury spoke to or was addressed by any outsider. Under these circumstances, the alleged separation of the jury cannot be regarded as prejudicial to the substantial rights of the defendant.

Judgment affirmed.

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## Hall, et al. v. Clay, Commissioner of Insurance.

(Decided January 19, 1915.)

### Appeal from Franklin Circuit Court.

**Statutes—Amendment, Revision and Codification.**—By Section 2 of Chapter 114 of the Acts of 1912, it was sought to amend Section 661, Kentucky Statutes, without re-enacting and republishing same, or the part thereof intended to remain in effect. Held: that the Section is void for failure to conform to the requirements of Section 51 of the Constitution.

KEITH L. BULLITT for appellant.

HAZELRIGG & HAZELRIGG, L. APPERSON, J. A. JUDY, JAMES GARNETT, Attorney General, and CHARLES H. MORRIS, Assistant Attorney General, for appellee.

### OPINION OF THE COURT BY JUDGE HANNAH—Reversing.

H. E. Hall and others, in the manner provided for in Section 661, Kentucky Statutes, applied to the Commissioner of Insurance for the State of Kentucky for a license or certificate of incorporation, granting to a company sought to be organized by them authority to do business as an Assessment or Co-operative Life Insurance Company, which authority the Commissioner declined to grant upon the ground that the incorporators

had failed to comply with Section 2 of Chapter 114 of the Acts of 1912, requiring that a guarantee fund of the value of \$100,000 be deposited with the State Treasurer, as a condition precedent to the granting of such authority.

The applicants then instituted this mandamus proceeding in the Franklin Circuit Court to coerce the granting of the authority sought, and the lower court declined to issue the writ. The plaintiffs appeal.

The only question presented upon the appeal is the constitutionality of the act mentioned, appellants contending that it is violative of the requirements of Section 51 of the Constitution.

Prior to 1914, the law governing Assessment or Co-operative Life Insurance Companies was Sub-division 3 of Article 4 of Chapter 32, Kentucky Statutes, 1909 Edition, being Sections 660 to 681, both inclusive.

In 1912 the General Assembly enacted Chapter 114 of the Acts of 1912, p. 384; and provided in Section 2 of that Chapter that Sub-division 3 of Chapter 32, Kentucky Statutes, should be further amended by adding thereto after Section 681 certain provisions, the effect of which, briefly stated, was to require the deposit with the State Treasurer of a fund of the value of \$100,000 by insurance companies of the character sought to be incorporated by the plaintiffs in this action, before commencing business.

This fund of \$100,000, provided for and required by the act of 1912 to be deposited with the State Treasurer, is to be realized from the sale of Guarantee Fund Certificates.

Now, Section 661, which is a part of Chapter 32, Article 4, Sub-division 3, Kentucky Statutes, requires (as amended by Acts 1910, Chapter 103) that a trust fund of at least \$10,000 shall be deposited by insurance companies of the kind here involved before they shall be authorized to commence business. It also requires that there shall have been secured at least two hundred subscribers for insurance in the aggregate amount of not less than two hundred thousand dollars; and the \$10,000 trust fund is to be realized by a five per cent. assessment on these subscribers.

But the act of 1912 (Chap. 114, Sec. 2), after providing for the guarantee fund of \$100,000, further provides that companies making this deposit with the State

**Treasurer shall not be required to make or maintain any other or additional deposit.**

And to this extent the act of 1912, Section 2, is amendatory of Section 661, Kentucky Statutes. Whether the whole of Section 661 was intended to be repealed, and the Legislature meant to dispense also with the requirement that the company should have two hundred subscribers for insurance aggregating at least two hundred thousand dollars as a condition precedent to the right to commence business, is left a matter of uncertainty.

It was to prevent just such conditions as this that Section 51 was included in the Constitution. No part of Section 661 was re-enacted or re-published. It follows, therefore, that Section 2 of Chapter 114, Acts 1912 (and Sections 3, 4, and 5, which are really sub-sections of Section 2) are violative of the constitutional requirement set up in Section 51 thereof.

We deem it unnecessary to discuss at length the purpose, nature and effect of Section 51 of the Constitution. The matter has been thoroughly considered and discussed in the recent cases of *Spencer v. Board of Prison Commissioners*, 159 Ky., 255, and *Hickman v. Kimbley*, 161 Ky., 652.

In the latter case it was sought to amend Chapter 89, Kentucky Statutes, by adding, after Section 3459, a section to be known as Section 3459a. This proposed new section, however, was amendatory in fact of a former section, 3449, no part of which was re-enacted or republished; and the court held that there was a failure to conform to Section 51 of the Constitution. The decision in the *Hickman* case forecloses the question here presented.

The judgment is reversed for proceedings consistent with the views herein expressed. Whole court sitting.

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### **Burns v. Moseley, et al.**

(Decided January 19, 1915.)

#### **Appeal from Daviess Circuit Court.**

1. **Wills—Construction.**—The words "bodily heirs" used in a will or deed are words of limitation, and ordinarily will be given their technical meaning; the word "children" is a word of purchase.

2. **Wills—Construction.**—But when the words “bodily heirs” are used in a will interchangeably with the word “children,” and it is apparent that the word “children” was used in the primary sense, and the words “bodily heirs” were descriptive merely, they will be construed as meaning children, and therefore words of purchase and not of limitation.

LOUIS IGLEHART for appellant.

MILLER, SANDIDGE & MALIN for appellees.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Reversing.**

This action was brought by Mrs. Florence A. Moseley and her husband for a construction of the will of her father, Louis I. Burns, who died a resident of Daviess county in November, 1879, the question being what interest Mrs. Moseley took thereunder.

The material clause of the will reads as follows:

“2nd. The home farm I give to my wife (containing two hundred and ninety-three acres) during her natural life. At her death I give the south side of the farm to my son, Samuel T. Burns, containing one hundred and forty-six acres, bounded as follows, viz: (Description by metes and bounds omitted.)

“The north half of the tract, at the death of my wife, I give to Florence A. Moseley and her children, if she should have any living, and should she have no bodily heirs living, then it is to go to my legal heirs; this half is bounded as follows, viz: (Description by metes and bounds omitted.)”

The will is a long one, containing devises to his different children; charging advances against them; and containing this further clause:

“Florence A. Moseley’s land and advancement is two thousand six hundred and eighty-two dollars.”

The testator left surviving him his wife, Elizabeth Burns, and six children, Samuel T. Burns, Florence A. Burns, Amanda F. Igleheart, Palestine C. Springfield, William P. Burns, and Nannie E. Bethel. The testator’s widow, Elizabeth Burns, died on April 21, 1884, without having re-married. Mrs. Moseley had one child born to her in 1874, but it died before the death of Elizabeth Burns, its grandmother. Mrs. Moseley claims her father devised said farm to her in fee, providing that her interest should be defeated only in case she should die

without bodily heirs before the death of her mother, Elizabeth Burns.

The chancellor took her view of the case, and from a judgment declaring that Mrs. Moseley was the owner of said farm in fee simple, and quieting her title thereto, her brother, Samuel T. Burns, prosecutes this appeal.

The judgment of the chancellor construed the will to mean that the testator intended to devise said north farm to Mrs. Moseley in fee, to be defeated only in the event she died without bodily heirs before the death of her mother, Elizabeth Burns. The appellant contends, however, that Mrs. Moseley took only a life estate, with remainder to any issue she might have at her death, and in the event she should have no issue, the remainder should go to the legal heirs of the testator.

The decision turns upon the effect to be given the words "and her children," as they are used in the will. If they are words of purchase, Mrs. Moseley took only a life estate; and appellant insists that they must be construed as words of purchase, and not words of limitation.

The cardinal rule for the construction of wills is that the intention of the testator, to be gathered from the whole instrument, must control; and if the intention appears, technical rules of construction are not to be applied if they lead to a different result. Thus, where it is apparent from the instrument that the word "children" is used in the sense of "heirs," the term "children" will be read as meaning "heirs" and construed as a word of limitation and not of purchase. *Kelly v. Parsons*, 127 S. W., 792; *Virginia Iron, Coal & Coke Co. v. Dye*, 146 Ky., 521.

In *Medford v. Dougherty*, 89 Ky., 58, Judge Pryor, in speaking for the court, said

"Where the devise is to A and his children, the children take as purchasers, and the question generally is, whether A is vested with a life estate or holds only a joint interest with his children. The word 'heirs' or 'heirs lawfully begotten' embrace all the descendants of the devisee or grantee; but the word 'children' embraces only immediate descendants, and when used in a deed or will, the children take as purchasers, and are vested, if living, when the devise is to one and his children, with a present interest, or take, under the devise, as they come into being."

In *Smith v. Smith*, 119 Ky., 904, the testator devised his property to his wife for life with remainder to his "son and his children." In holding that the son took but a life estate, with remainder to his children, the court said:

"The word 'children,' as here used, must, we think, be considered as a word of purchase and not of limitation, and must always be so regarded when so used in the devise, unless there is some qualifying word or phrase in juxtaposition thereto to show that it is intended as a word of limitation, or unless in some other part of the will there are words or phrases which explain that the testator used the word 'children' in the latter sense."

In *Kelly v. Parsons*, 127 S. W., 792, the court stated the rule as follows:

"Where it is apparent from the instrument that the word 'children' is used in the sense of 'heirs,' as where they are used interchangeably, the term 'children' will be read as meaning 'heirs,' and construed as a word of limitation and not of purchase. *McFarland v. Hatchett*, 118 Ky., 423; *Moran v. Dillehay*, 8 Bush, 434; *Hood v. Dawson*, 98 Ky., 285; *Lachland's Heirs v. Downing's Heirs*, 11 B. Mon., 32; *Williams v. Duncan*, 98 Ky., 125."

In *Naville v. American Machine Co.*, 145 Ky., 349, the court reviewed the cases at length, and deduced therefrom the following general rules, under the Kentucky decisions, for the construction of wills:

First, where there is a devise by the father or mother to a son, daughter or blood relation in which the language "to him and his children forever" is used, the word "children" has been construed as meaning "heirs," and the children take no interest in the property devised.

Second, in devises to a blood relation and his children, where the word "forever" is not used following the word "children," the children take a fee subject to the life estate of the parent; and,

Third, in devises by a husband to his wife and her children, the parent takes a life interest and the children take the fee.

See also *Hayes v. Hayes*, 154 Ky., 129.

If the will had devised the farm to Mrs. Moseley "and her children," the case would have come within the third rule above announced, and would be without difficulty, for, in such a case, Mrs. Moseley would unquestionably have taken a life estate with remainder in



fee to her children. But the subsequent language of the clause in question makes its construction more difficult.

In *Simpson v. Adams*, 127 Ky., 790, the principal rules for the construction of wills are set forth, the first of said rules reading as follows:

“Where an estate is devised to one for life, with remainder to another, and, if the remainderman die without children or issue, then to a third person, the rule is that the words ‘dying without children or issue’ are restricted to the death of the remainderman before the termination of the particular estate.”

Mrs. Moseley contends that her case comes within the rule just announced; and in so deciding the chancellor held that the words “dying without children or issue” were equivalent to the qualifying words in the Burns will, “should she have no bodily heirs living then it is to go to my legal heirs.”

But we have been unable to reach that conclusion, since the conveyance to Mrs. Moseley is limited in case she should have no bodily heirs; and the terms “children” and “heirs” have not the same technical meaning.

In *Duncan v. Medley*, 160 Ky., 684, the conveyance was “to Hettie E. Duncan, our daughter, her children the heirs of her body;” and the court was called upon to say whether the words “heirs of her body” were used synonymously with “children.” The circuit court held that the children of the life tenant took an interest in remainder; and in affirming that ruling, this court said:

“The term ‘heirs of her body’ is one of limitation, and will ordinarily be given its technical meaning. *Dotson v. Kentland Coal & Coke Company*, 150 Ky., 60. The word ‘children’ used in a will or deed of conveyance is a word of purchase.

“But, where it is apparent from the will or deed that the word ‘children’ is used in the sense of ‘heirs,’ it will be read as meaning ‘heirs’ and construed as a word of limitation. *Virginia I. C. & C. Co. v. Dye, et al.*, 146 Ky., 519.

“On the other hand, where it is apparent from the instrument that the term ‘heirs of her body’ is used in the sense of ‘children,’ it will be read as meaning ‘children,’ and construed as a word of purchase and not of limitation. *American National Bank v. Madison*, 144 Ky., 152; *Hunt v. Hunt*, 154 Ky., 679.

"In the deed here under consideration, the language is, 'to Hettie E. Duncan our daughter her children the heirs of her body.' The terms 'her children' and 'the heirs of her body' are used synonymously. Being so used, the question presents itself as to whether 'her children' was used as meaning 'the heirs of her body,' or whether 'the heirs of her body' was used as meaning 'children.' In other words, which term was used in the primary sense and which was descriptive?

"The rule to be applied in determining this question is to try to ascertain whether the grantor intended that his daughter should take in fee, or a life estate only; and there is but little language in the deed to assist us in a determination of the grantor's intention. \* \* \* \*

"In the deed under consideration in the case at bar the inclusion of the provision that 'W. T. Duncan agrees not to trade his lifetime interest in said land,' indicates a purpose in the grantor of protecting the interest of the children; and also aids in arriving at the conclusion that the words used in the deed were not intended as words of limitation. We are of the opinion that the circuit court properly construed the deed in question and that the judgment should be affirmed."

Likewise, the question here is to determine which of the terms, "children," "bodily heirs," or "legal heirs," was used in the primary sense, and which was descriptive.

While the case is not without difficulty, when the clause is read as a whole, it is apparent that the testator's purpose was to care for the children of his daughter Florence, and that the term "children" is the primary word, the later words "bodily heirs" and "legal heirs" being merely descriptive in purpose and effect.

This intention is shown by the direction that if Florence should have no "bodily heirs," meaning children, then the land should go to the testator's other legal heirs.

We conclude that the words "her children" were not intended as words of limitation upon the estate of Florence, and that the circuit court erred in so holding. Florence took a life estate only, with remainder to her children, who took as purchasers.

The subsequent clause of the will above quoted, which fixes the testator's valuation of Florence's land and advancement at \$2,682.00, throws no light upon the

character of her estate, or the estate of her children therein. Neither the children nor the heirs are mentioned in that clause; it devises nothing; it merely fixes the valuation of the devise theretofore made, for purposes of equalization with the other five children of the testator. The character of the devise as between Florence and her children remained to be determined by the language of the second clause.

Judgment reversed with instructions to the circuit court to enter a judgment in accordance with this opinion.

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### **Louisville & Nashville Railroad Company v. Gaddie.**

(Decided January 19, 1915.)

#### **Appeal from Knox Circuit Court.**

**Carriers—Carriers of Passengers—Performance of Contract of Transportation—Carrying to and Stopping at Destination.**—A railroad company has the right to make reasonable rules and regulations for the operation of its trains; and it is the duty of the passenger before boarding a train, to ascertain whether it stops at the place to which he desires to go; and if he boards a train not scheduled to stop at his destination, he cannot recover damages because of the refusal of the conductor to stop thereat, although if the passenger at the time he purchases his ticket effects an agreement with or receives information from the ticket agent that the train he proposes to take will stop at his destination to permit him to alight, the company is ordinarily bound by the agreement. Where, however, there is no such agreement or information made or given by the ticket agent when the ticket is purchased, and by mistake of the gateman and brakeman, a passenger is permitted to board a train not scheduled to stop at his destination, the conductor has a right to correct the error, and to require the passenger to leave the train at an intermediate station which is a regular stop and a suitable place to wait for the next train which does stop at the passenger's destination.

**BENJAMIN D. WARFIELD and BLACK, BLACK & OWENS** for appellant.

**B. B. GOLDEN** for appellee.

**OPINION OF THE COURT BY JUDGE HANNAH—Reversing.**

**J. P. Gaddie** sued the Louisville & Nashville Railroad Company in the Knox Circuit Court to recover damages

resulting from an alleged breach of its duty as a common carrier of passengers, in refusing to stop one of its fast passenger trains at the place of plaintiff's destination and permitting him to alight therefrom. There was a verdict and judgment for the plaintiff for \$1,000.00. The railroad company appeals.

Plaintiff testified that he is now the president of the Peoples Bank at Pineville and resides in that city, but that in January, 1912, he lived in a brick building about two hundred and fifty yards from the depot at Elys, a station in Knox county, on defendant's line of railroad. That on January 17, 1912, he purchased from the defendant's ticket agent at Frankfort, a ticket which entitled him to be transported to Elys, via Louisville, and that he left for home that afternoon.

At Louisville he changed trains, boarding the next train out of Louisville for Corbin, arriving at Corbin about midnight. There it was again necessary to change trains and to take passage upon a train running from Corbin to Norton, Elys being on that line and about twenty-five miles east of Corbin.

There were two trains leaving Corbin daily on this line that were scheduled to stop at Elys, one leaving about six in the morning, the other about two-thirty in the afternoon, each requiring about one and a half hours to reach Elys.

There was also a fast train leaving over this road at about 3:45 in the morning, but this train was not scheduled to stop at Elys, and plaintiff waited in and around the station until this train was due to leave and boarded it. When the conductor came to collect Gaddie's fare, and saw that his ticket was for Elys, he immediately informed him that the train would not stop at that place and that he would have to alight at Flat Lick, an intermediate station, one mile west of Elys. This plaintiff said he would not do. Later, as the train was nearing Barbourville, the county seat of Knox county, the conductor asked Gaddie if he would not rather alight at Barbourville, where he could get a hotel, than at Flat Lick, but plaintiff declined to accept the suggestion, and he says that the conductor did not speak to him after that.

When the train stopped at Flat Lick plaintiff failed to alight. He admits that he knew that Elys was not a regular stop for that train, having lived at said station

for years, but testifies that he did not think the conductor would be so contrary as not to stop there for him to get off. However, he was mistaken in this and was carried on past Elys to the next regular stopping place—Four Mile. There he voluntarily left the train and proceeded to walk the two miles back to Elys. He testifies that it was so dark that he could not see anything, and that he fell into a ditch and over some cross-ties and skinned his legs, and was badly injured. That the coach was very warm when he got off and coming out in the cold air and having to walk so far on the ice and sleet, he was chilled and contracted a cold and suffered greatly.

1. It has been held that a carrier has a right to make and enforce reasonable rules and regulations for the operation of its trains; that it is the duty of a person proposing to become a passenger, to ascertain, before boarding the train, whether it stops at his destination; and that a passenger who boards a train not scheduled to stop at the station to which he desires to go, can not recover damages for the failure of the conductor to stop thereat.

In *L. & N. v. Miles*, 100 Ky., 84, 37 S. W., 486, 18 R., 580, it was said that "if it be within the power of a passenger by getting aboard a train to compel it to stop at any station he may designate, then the authority of the company to make reasonable rules for the conduct of its business and the running of its trains is destroyed, the traveling public would be seriously interrupted; a railroad could no longer calculate upon its trains making certain connections with trains on other roads, and the hazard of operating them would be increased."

The rule stated in that case, however, is subject to the limitation expressed later in the opinion in *L. & N. v. Scott*, 141 Ky., 538, 133 S. W., 800, 34 L. R. A. (n. s.), 206, 1912C Ann. Cas., 547, wherein it was held that a railroad company is ordinarily bound by the act of its ticket agent in agreeing with or informing the purchaser of a ticket to a certain station that the train proposed by the passenger to be taken will stop at the station for the purpose of permitting the passenger to alight thereat.

2. In the case at bar Gaddie had no information from or agreement with any ticket agent that the train he boarded would stop at Elys; but he claims and tes-

tified that when the train upon which he took passage at Corbin was announced, he went through the gate through which all passengers were required to pass in order to reach the train; that the gateman called for the exhibition of tickets; that he held his ticket up and the gateman pointed and called out the number of the track on which was standing the train which he boarded. He further testified that as he was about to step on the train the brakeman asked him where he was going, and he replied that he was going to Elys, and went on in the train without objection upon the part of the brakeman.

Because of these facts, it is contended that it was the contractual duty of the company to stop the train at Elys.

The greater weight of authority supports the rule that where a passenger, by reason of incorrect information of the carrier's employes, boards a train not scheduled to stop at the station for which he has a ticket and to which he desires to go, the carrier has a right to correct the mistake and to require the passenger to alight at a regular stopping place, which is a suitable place, from which he may take the next regular train that does stop at his destination; and that it is the duty of the passenger to stop off at such place and wait for such train. *Carter v. Southern Ry.*, 75 S. C., 355, 55 S. E., 771; *Black v. A. C. Line*, 82 S. C., 478, 64 S. E., 418; *Runyon v. Penna. Ry.*, 74 N. J. L., 225, 68 Atl., 107; *International Ry. v. Hassell*, 62 Tex., 256, 50 Am. Rep., 525; *Miller v. King*, 21 App. Div. (N. Y.), 192, 47 N. Y. Supp., 534; *L. S. & M. S. v. Pierce*, 47 Mich., 277, 11 N. W., 157; *Turner v. McCook*, 77 Mo. App., 198; *St. L. & S. W. v. Wallace*, 32 Tex. Civ. App., 312, 74 S. W., 581; *St. L. & S. W. v. Townsend*, 45 Tex. Civ. App., 616, 101 S. W., 455. This, we think, to be a sound rule of law.

We do not mean to be understood, however, as holding that when the passenger, at the time he purchases his ticket, is informed by the ticket agent that the train he proposes to take will stop at his destination to permit him to alight, although it is not a regular scheduled stop for such train, the carrier may correct such error and the passenger be required to alight at an intermediate station, for the carrier in such case has made its contract; and that contract the passenger has a right to enforce.

But, where no specific agreement for such stopping of the train is clearly shown to have been effected at the time of the purchase of the ticket, then the mere act of a gateman or brakeman in making no objections to the boarding of the train by the passenger ought not and will not estop the company from a correction of the error by the conductor requiring the passenger to leave the train at a suitable intermediate point, there to wait for and take passage upon a train which does stop at the passenger's destination. Nor do we hold that, where a passenger makes inquiry of the gatekeeper, or those in charge of the train, as to the train he should take, and, acting under their directions, is caused to board the wrong car, that he cannot recover for lost time and increased expenses necessarily incurred by reason of such incorrect information. This question is not before us here. What we do hold is, that, under the circumstances testified to by plaintiff, the defendant owed plaintiff no duty to stop its fast train at Elys for the purpose of letting him off. It was his duty, when informed by the conductor that the train would not stop at Elys, to elect to stop at some one of the intermediate stations at which the train would stop before reaching Elys; and this he refused to do and he has no cause of action against the defendant. The court improperly refused to instruct the jury to find for the defendant.

The judgment is reversed for proceedings consistent with this opinion.

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### **Louisville & Nashville Railroad Company v. Walker's Administrator.**

(Decided January 19, 1915.)

#### **Appeal from Whitley Circuit Court.**

1. **Employers' Liability Act—Employee Defined.**—Under the Federal Employers' Liability Act an employee who is engaged in interstate commerce while actually employed at his work will be treated as in the course of his employment when he is going to or from his work on the premises of the employer in a car appointed by his employer for the purpose of carrying him to or from his work, or while he is walking to or from his work on the premises of the employer and along the way set apart by the employer as a means of ingress and egress.

2. **Master and Servant—Liability of Master for Injury to Servant in Going from His Work.**—Where an employe of a railroad company was killed by the negligence of his employer while he was walking, at the end of the day's work, on premises of the company, to boarding cars owned by it in which he boarded, a right of action arose in behalf of his administrator under the Federal Employers' Liability Act to recover damages for his death.
3. **Master and Servant—Negligence.**—While an employe of a railroad company was going from his work to boarding cars of the company and for this purpose was walking across a trestle from which he was knocked by a piece of timber projecting from a push-car operated by other employes of the company, the company was properly held liable in damages for the negligent manner in which the operators of the push-car loaded on it the timber and for their negligence in failing to give the employe who was killed warning of its approach.
4. **Employers' Liability Act—Liability for Negligence of Employee Not Engaged in Interstate Commerce.**—To entitle an employe engaged in interstate commerce to recover damages for injuries sustained in such commerce, it is not necessary that the injuries should have been caused by the negligence of another employe engaged in interstate commerce. It will be sufficient if the negligent party was an employe of the company.

B. D. WARFIELD, C. H. MOORMAN and HIRAM H. TYE for appellant.

O'REAR & WILLIAMS and POPE & ROSE for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

The Louisville & Nashville Railroad Company is engaged in interstate commerce, and Ancil Walker, on the day of his death, was employed by it as a laborer in such commerce. Whether he was so employed immediately at the time of his death is a much disputed question and will be later carefully considered.

At the time of his death he was about thirty years of age and left surviving him a widow and one child about three years of age.

In this action by his administrator to recover damages for his death there was a verdict and judgment accordingly for \$4,750. Before stating the grounds of reversal relied on by counsel for appellant a somewhat extended statement of the facts should be made in order that the questions submitted for review may be intelligently disposed of.

The railroad company, at the time Walker came to his death, was engaged in repairing or rebuilding a



trestle known as the Oak street trestle, situated on its line of road in the State of Tennessee and near the city of Knoxville, and Walker was employed as a laborer in this work. The foreman of the crew engaged in this work was A. C. Crutchfield, who also operated the boarding cars in which the men lived. Crutchfield had charge of the bridges of the railroad company in a territory traversed by its line of road extending from a point in Kentucky to a point in Tennessee, and the boarding cars, which were owned by the railroad company, were moved by it to the different places at which Crutchfield and his men were ordered to work. The matter of boarding the men and the amount charged for this service was under the control of Crutchfield, the railroad company having apparently no direct concern in it, although it would upon request of Crutchfield, take out of the wages due the men the board for his benefit.

On the day Walker was killed the boarding cars, in which the men, including Walker, boarded and stayed at night, were standing on the tracks of the company something over a mile from the trestle on which this crew of men were at work, and the men went from these boarding cars to their work each morning and returned to them at the close of the day. Sometimes the men went to and from the boarding cars to their work on hand-cars of the company, and at other times they walked.

On the day in question the men started from their work to the boarding cars on hand-cars, but after going a short distance were compelled to take the hand-cars off the track on account of obstructions, and they were then directed by Crutchfield, the foreman, to walk to the boarding cars, and this they set out to do by walking on the track of the company as it was usual and customary for them to do when not riding, there being in fact no other convenient or practicable way to go to and from the boarding cars and the work except on the track. Between the place of work and the boarding cars the track for a short distance ran on a high trestle that the men had to walk across, and it appears that on the outside of each rail of the track, which was entirely unprotected by barriers of any kind, there was a running-board upon which the men could stand or walk, or they could walk between the rails on the ties.

As Walker was walking across this trestle, a car, known as a push-car, owned by the company, came down

the track from the direction in which Walker was walking. For the purpose of letting this car, which was being operated by two employes of the company, pass, he stepped on the plank outside the rail and while so standing was struck and knocked from the trestle by a large splinter that projected several inches over the side of the car from a piece of timber on the car to which it was attached. The piece of timber from which the splinter projected, as well as the other pieces on the car, consisted of material which the company found it could not use in its work, and the men who were operating the car were taking these pieces of timber to their homes after the day's work was over for the purpose of using them as kindling or fire-wood, having been permitted by an assistant foreman of the company, who had control of the car, to use it for the purpose of carrying home the timber that another foreman of the company had told them they might take.

Brad Thomas, one of Crutchfield's crew, was walking on the trestle with Walker, but a few feet ahead of him. He testified that he saw the push-car coming when it was a short distance away and stepped off the track on to the running-board, but did not see the piece of timber projecting over the side of the car until one of the men on the car holloed at him to "watch that piece!" That, upon receiving this warning, he at once placed himself in a more careful position and holloed at Walker, who was close behind him, to "look out!" He further testified that the projecting piece of timber struck his clothing and also struck Walker and knocked him off the trestle, and that at the time the push-car passed him it was going down a slight grade at a speed of about ten miles an hour, the two men in charge of it riding on the side of the car, pushing it with their feet. He also said that if it had not been for this projecting piece of timber Walker could have safely stood where he was standing when knocked off.

The evidence for the railroad company was to the effect that Hobbs and Collins, the men operating this car, did not have authority from the foreman either to use the push-car or get the timber they were carrying on it. It also appears in the evidence that there were places eight or ten feet apart in this trestle from which Walker fell on which a person could stand and be entirely out of the way of passing trains, and there is some

suggestion to the effect that if Walker had been standing on one of these places, he could not have been hit by the projecting splinter, and that when he saw the car coming he should have gotten to one of these places of safety. It is also a theory of the company that Walker fell from the trestle and was not knocked off by the splinter.

The evidence, however, shows that if the splinter had not been projecting from the car it would have passed Walker without touching him; and here it may be observed that, although Walker could have seen, and doubtless did see, the push-car approaching him, it seems apparent that he did not see the projecting splinter, nor, indeed, did Thomas, who was immediately ahead of him, until one of the men holloed at him to look out for it. In short, there is really no evidence of contributory neglect on the part of Walker in the record, although this feature of the case was submitted to the jury for their consideration in appropriate instructions, and we may also assume from the evidence that Walker was knocked off the trestle by the splinter.

Returning now to the question whether Walker, at the time he came to his death, was, within the meaning of the Federal Act, in the employment of the company, the argument is made by counsel for the company that the protection afforded by this act ended when Walker quit his work on that day and that he was not in the employment of the company at the time he was killed, as his day's work had then ended and he was going to his boarding place.

It is further insisted that if Walker, when going to his boarding place, could be regarded from any standpoint as an employe, he was not, within the meaning of the act, an employe engaged in interstate commerce. We think, however, that if he should be considered at that time as an employe at all, he was an employe engaged in interstate commerce, because this was the only kind of employment in which he was engaged. At the time of his death he was either an employe engaged in interstate commerce or he was a mere licensee using the tracks of the company in going from his place of work to the boarding car.

It is very clear that while actually engaged at work for the company he was an employe engaged in interstate commerce, and we think it equally clear that the moment his day's work ended he was not thereby con-

verted into some other kind of an employe, but that he either retained his character as an interstate employe or became, when his work ended, and while going to the boarding car, under the circumstances stated, a licensee.

After giving to this question careful consideration, our opinion is that in going from his place of work to his boarding car he continued in the character of an employe of the company, engaged in interstate commerce. The boarding cars in which he took his meals and remained at night were owned by the company. They were carried about by the company from one State to another State and from place to place for the convenience and accommodation of its employes, and at the time in question were standing on the tracks of the company. The employes were not only invited to, but were, in a measure, obliged by the company, to use these boarding cars, and the only convenient and practicable way to go to and from the cars and the place of work was on the track of the company where Walker was when knocked off. Furthermore, it was not only the custom of the men to use this way, but on this particular occasion they were directed by the foreman in charge of the work to so do after the hand-cars had been abandoned.

We, therefore, have a case in which the employe not only worked for the company in the day-time, but ate his meals and occupied at night a place on its premises, set apart by the company for his use and accommodation. And so, we think, that, under these circumstances, an employe such as Walker was should be treated as engaged in interstate commerce not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the company. In other words, within the contemplation of the act, the course of his employment covered not only the time he was actually engaged at work, but the time he was engaged in going to and from his work.

The Federal Hours of Labor Act, making it unlawful for any carrier to permit an employe subject to the act to be or remain on duty for a longer period than sixteen consecutive hours, defines employes as "persons actually engaged in or connected with the movement of any train." *Osborne's Admr. v. C., N. O. & T. P. Ry.*, 158 Ky., 176. But the Federal Employers' Liability Act, providing that the common carriers subject to the act

shall "be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier . . ." does not undertake to define the meaning of the word "employed" as used in the act or to describe, except as indicated, the employes to whom the act applies.

The failure of Congress to define the meaning that the words "employment" and "employee" should have in the application of the act, manifests, as we think, a purpose in this legislation that these words should be used in their ordinary sense and be interpreted according to their usage in the law of master and servant. Viewed in this light, there is abundant authority for the proposition that employment does not always either begin or end with the actual work of the day in which the employee is engaged, but may begin when the employee enters the premises of his employer for the purpose of going to his work and may continue while he is going from his work at the end of the day on the premises of the employer.

Neither is it open to doubt that the relation of master and servant or employer and employee in cases like this begins with the employment and continues until it is ended. For example, it is a generally recognized rule that a railroad employee, while being carried to and from his work on the cars of his employer, is to be treated as being in the employment of the company to the same extent as if actually engaged in the work for which he is employed. Accordingly, if he is injured by the negligence of the company while being thus carried to or from his work, his right of recovery is controlled by the same principles that would control if he had been injured while actually engaged at his work. *Bailey on Personal Injuries*, Vol. 1, page 63; *Labatt on Master and Servant*, Vol. 2, page 1823; *Vick v. New York Central & Hudson River R. R. Co.*, 95 N. Y., 267, 47 Am. Rep., 36; *Gilman v. Eastern R. R. Corporation*, 10 Allen (Mass.), 233, 87 Am. Dec., 635; *McQueen v. Central Branch R. R. Co.*, 30 Kan., 689; *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. State, 384; *Ionnone v. N. Y. Railroad Co.*, 21 R. I., 452, 79 Am. St. Rep., 812.

We, therefore, think there would be no doubt that if Walker, while riding on the hand-car on which he and

the other men started to go, under the direction of the foreman, from his work to the boarding cars, had been injured by the negligence of the company, he would be treated as being in the employment of the company with the rights accorded to such employees.

Now, if it be a sound rule that an employe, who is injured by the negligence of his employer while being carried to or from his work on an instrumentality furnished by the employer for that purpose, has a right of action against the employer, we are unable to perceive any good reason why an employe who is injured by the negligence of the employer while walking to or from his work on the premises of the employer, and in a place selected or set apart, either by direction or by well-established custom or usage, should not have the same right of recovery as if he had been injured by the negligence of the employer when being carried by it to or from his work.

The right of the employe and the liability of the employer do not depend upon the means used by the employe in going to and from his work, but upon the question whether, in going to and from it, he remains on the premises of the employer and uses the place or the means selected or designated by the employer or established by usage and custom as a means of ingress and egress to and from his work. The employer in a case like this owes the employe the duty of furnishing him on its premises a reasonably safe place of ingress and egress to and from his work, and this duty is neither added to nor diminished by the fact that the employe rides or walks. Whether he does one or the other, the protection afforded him is the same and the duty and liability of the employer identical. The doctrine of safe places and safe premises and safe instrumentalities in this class of cases is rested on the rule of general application that the employer is under a duty to exercise ordinary care to protect the employe from danger, not only while he is actually engaged at his work, but while he is on the premises of the employer in going to and from his work along the way set apart by the employer for this purpose.

There seems to us no room or reason for the assertion in a case presenting facts like this that the duty of the employer ends the moment the day's work is over, or that, when the employe is on his way home on the premises of the employer and going over the way ap-

pointed for the purpose, he forfeits his right to the protection afforded employes while engaged in work and takes all the risk of harm that may come to him from the negligence of the employer. *Ellsworth v. Matheney*, 104 Fed. Rep., 119, 51 L. R. A., 389; *Ewald v. Chicago & Northwestern R. R.*, 70 Wis., 420, 5 Am. St. Rep., 178; *Virginia Bridge & Iron Co. v. Jordon*, 143 Ala., 603, 5 A. & E. Ann. Cases, 709.

The other material question in the case is, was the death of Walker caused by the negligence of employes of the company?

Briefly, the evidence upon this feature of the case, although conflicting, was, we think, sufficient to show and to authorize the jury to find that Walker was knocked from the trestle by the projecting splinter and that the push-car was being used by the employes at the time with the consent of the company through its foreman, and for the purpose of enabling them to carry to their homes the timber that was on the car.

It is true that the men who were operating the push-car, although employes of the company, had finished their day's work and were on their way home, but we do not regard the circumstance that their day's work was over of any moment in determining the rights of the parties to this litigation. We think that while operating this push-car for the purpose stated Hobbs and Collins should be treated as employes of the company; but, whether this be so or not, the liability of the company for their acts attaches on account of the acts of its foreman in giving these men permission to use the car at the time and for the purpose they were using it, as this foreman was at the time he gave the permission admittedly in the employment of the company. And, this being so, it is not indispensable to a recovery by the plaintiff that he should show that the men operating the push-car were employes at the time the accident occurred.

Under the Federal Act it is not necessary that the employes whose negligence caused the injury should themselves, at the time the negligence occurred, be engaged in interstate commerce. The carrier must be engaged in such commerce and the person injured must be employed by it in such commerce, but the employes of the carrier whose negligence produces the injury need not be so engaged. It is sufficient if they are employes, as the act reads: "Liability shall attach for such in-

jury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier." *Pedersen v. Delaware R. Co.*, 229 U. S., 146, 57 L. Ed., 1125.

This push-car was being used by the persons operating it with the consent of an authorized employe of the company, and when he consented that they might use it for the purpose indicated, the company at once undertook the duty and obligation of exercising ordinary care to see that it was so used as not to inflict injury upon other employes of the company who were exercising care for their own safety. The employe who consented to the use of the car knew the purpose for which it was going to be used and engaged that the persons who were thus given the right to use it would exercise ordinary care in its use.

In using the car and in carrying timber on it the men operating it were not trespassers nor engaged in any wrongful act. They were doing what they had been given permission to do by an authorized employe of the company, but they were doing it in a negligent way, and the company is, we think, chargeable with their negligence. Walker was entitled to be furnished by the company reasonably safe conduct on his way from his work to the boarding car, and this duty imposed on the company was broken by the negligence of the persons who were using, with its consent, this push-car.

That these men were guilty of negligence in placing the timber on the car in the manner they did, is scarcely open to doubt, and they were also negligent in failing to give Walker notice of the projection of the splinter and in running the car at the speed the testimony shows it was going with the splinter so projecting.

We are referred by counsel for the railroad company to the cases of *Eastern Ky. Ry. Co. v. Powell*, 17 Ky. L. R., 1051; *Bowling Green Stone Co. v. Capshaw*, 23 Ky. L. R., 945; *Illinois Central R. R. Co. v. Dotson*, 24 Ky. L. R., 1459; *Louisville & Nashville R. R. Co. v. Routt*, 25 Ky. L. R., 887; *Corrigan v. Hunter*, 139 Ky., 315; *Ballard's Admx. v. L. & N. R. R. Co.*, 128 Ky., 826; *C. & N. O. & T. P. Ry. v. Rue*, 142 Ky., 694; *Sullivan v. L. & N. R. R. Co.*, 115 Ky., 447, and other cases holding that the employer is not liable to persons injured by the acts of employes committed outside the scope of their employment or out of the field of their duty; but we do not



think this line of cases is applicable to the facts of this case. Here the actionable negligence consisted in the permission given by an authorized employe of the company to the men to use, for the purpose they were using it, the push-car, and their negligent use of it was the same as his negligent use of it would have been. If the employe who gave to these men permission to use the car had been using it himself in the manner they were using it, we think there could be no doubt of the liability of the company for his negligence, and, in our opinion, there is no difference, so far as the liability of the company is concerned, between his use of the car and the use made of it with his permission.

Some errors in the admission and rejection of evidence are pointed out, but, not regarding them as substantial, we do not think it would serve any useful purpose to discuss them.

The instructions are criticized, but we think they fairly submitted the issues to the jury.

Upon the whole case, we think the judgment should be affirmed, and it is so ordered.

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### Kentucky Motor Car Company v. Darenkamp, et al.

(Decided January 19, 1915.)

Appeal from Kenton Circuit Court  
(Common Law and Equity Division).

**Sales—Delivery—What Constitutes—Instruction.**—An instruction "That, in law, there is a delivery of property by a seller to a purchaser when the seller places the property at the disposal of the purchaser and relinquishes to the purchaser the control and right of control of, or dominion over, the property and the purchaser takes, or accepts, the control and right of control, or dominion, over the property," correctly defined delivery, although there might have been added to it the words, "Acceptance need not be by words but may be by act or acts of the purchaser."

**RICHARD G. WILLIAMS and BYRNE & READ** for appellant.

**ROBERT C. SIMMONS** for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

The appellant motor car company sold, as it claimed, to the appellees, Ed and John Darenkamp, who are

brothers, an automobile for \$700. It appears that on October 26, 1912, Ed Darenkamp signed a contract agreeing to purchase an automobile for \$700, \$10 of which was paid in cash and the contract recited that the balance of \$690 was to be paid "when delivery of car is tendered." On November 2, \$490 was paid on the car, leaving a balance of \$200 due, and a few weeks after this the motor car company brought suit against Ed Darenkamp to recover this amount.

In January, 1913, Ed Darenkamp filed an answer in which he denied that he purchased the car and said that it had been sold to his brother, John Darenkamp, and that by mistake he had signed the contract. He further pleaded his infancy as a defense.

About the time this answer was filed John Darenkamp brought suit against the motor car company to recover \$500 which he alleged he had paid on the purchase price, upon the ground that the company refused to deliver to him the car he had purchased.

Thereafter the suit of the motor car company against Edward Darenkamp and the suit of John Darenkamp against the motor car company were consolidated, and in a pleading, which was at once a reply to the answer and a counter-claim against John Darenkamp, it denied the affirmative matter in the answer of Ed Darenkamp and for counter-claim against John Darenkamp sought to recover the balance of \$200 it alleged he owed, and further pleaded that the car was sold to both Ed and John Darenkamp. It might here be noted that it appears from the record that John Darenkamp, on October 26th, signed a contract in terms the same as the one signed by Ed.

The controversy between these parties grew out of the fact that after the \$500 had been paid, and while the car was in the possession of the motor car company at its garage, a demonstrator in its employment took Ed Darenkamp out for a ride, during which the car was badly damaged in a collision with a telegraph pole or some other object. A day or two after this John Darenkamp went to the motor car company to pay the balance due on the car, \$200, and get possession of it, but when he was informed that he would have to take the car in its damaged condition, or else pay the expense of repairing it, something over \$100, he declined to accept the car, and thereupon these suits were brought.

The case for the motor car company was practiced in the trial court upon the theory that the car, at the time it was injured, was the property of the Darenkamps, it having been sold and delivered to them before that time.

On the other hand, the defense was that, although the car had been purchased and \$500 paid on the purchase price, the title to the car had not passed, and was not to pass until it was delivered, and delivery was not to take place until the balance of \$200 was paid, which balance had not been paid when the accident occurred, and because this sum was due and unpaid the motor car company retained the possession of the car.

On a trial of the case, the court instructed the jury to find a verdict for Ed Darenkamp upon the ground that the alleged contract with him was not enforceable on account of his infancy, and, as to John Darenkamp, the jury was instructed: "That, in law, there is a delivery of property by a seller to a purchaser when the seller places the property at the disposal of the purchaser and relinquishes to the purchaser the control and right of control of, or dominion over, the property and the purchaser takes, or accepts, the control and right of control, or dominion, over the property. If the jury shall believe from the evidence that at any time prior to the accident and injury to the automobile, mentioned in the evidence, the plaintiff delivered said automobile to John Darenkamp, Jr., or his agents or representatives, the jury will find a verdict for the plaintiff against him for \$200, with interest."

They were further instructed that if the car had not been delivered, prior to the accident, to John Darenkamp or his agents, they should find a verdict in his favor against the motor car company for \$500, with interest.

Under these instructions the jury found a verdict for John Darenkamp, on which judgment was entered, and the motor car company appeals.

The grounds relied on for reversal are, that the verdict was contrary to the evidence, and that the court erred in giving the instructions mentioned and in refusing an instruction offered by the motor car company.

It may here be observed that the only difference between the refused instruction and the one given is that in the refused instruction the jury were advised that acceptance of property "need not be by word, but may

be by act or acts of the purchaser." This difference we do not regard as material under the facts of this case, and we also think the given instruction on the subject of what constitutes delivery of personal property was correct, although there could be no objection if the words taken from the offered instruction had been added.

On this appeal the argument is made for the motor car company that the trial judge made the case turn on the question whether there had been a delivery of the automobile, when the real question was, had there been a sale? But we do not think the trial judge erred in taking this view, as it appears counsel for both parties regarded the question of delivery as the only issue in the case, and, in fact, it was the only issue, as the rights and liabilities of the parties depended upon this question.

There is really no dispute about the fact that there was a sale. John Darenkamp admits the purchase of the automobile for \$700, and both parties agree that \$500 of this \$700 was paid, but the question remains, did the title pass to John Darenkamp by virtue of this sale, or was the automobile to remain the property of the company until the whole of the price was paid and the car delivered?

There might be a sale of personal property in which the title would pass from the seller to the buyer without delivery. There are also cases involving the sale of personal property in which delivery is essential to pass title from the seller to the buyer, but whether the title passes by the sale or by the delivery is to be determined by the facts of each particular transaction. *Thompson v. Brannin*, 94 Ky., 490; *Hagins v. Combs*, 102 Ky., 165.

At the time of the accident the automobile had never been out of the possession of the motor company. In fact, it had only been used by the Darenkamps twice before the injury, and each of these times it was operated by and in the control of a demonstrator for the motor company, and was being operated by and in the control of this demonstrator when it was injured. There is also testimony to the effect that when the machine was being taken out of the garage on the night of the injury to it, the manager of the automobile company told the demonstrator not to take it out, as it had not been paid for. And we think there was sufficient evidence to support the verdict, tending to show that the car had

never been actually used by or in the possession of the Darenkamps, although the evidence on behalf of the motor car company is to the effect that when the \$500 was paid the title to the car passed to the purchaser and it was being kept by it in its garage merely as an accommodation.

It should not, however, be overlooked in this connection that the written contract provided that the balance of the purchase price, \$200, was to be paid "when delivery of car is tendered." It is further shown by the evidence that, as a part of the trade, the motor car company was to put a new spring on the car and a new light, and, perhaps, some other fixtures, and that none of these things had been put on the car at the time it was injured.

It may be conceded that the weight of the evidence supports the theory of the motor car company, but we think there was enough evidence in behalf of John Darenkamp to support the verdict in his behalf, and we do not feel justified upon this conflicting evidence to say that the verdict is so flagrantly against it as to warrant us in ordering a new trial.

Wherefore, the judgment is affirmed.

### Hayes, et al. v. Nic Adamo Company, et al.

(Decided January 19, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas, Second Division).

1. Landlord and Tenant—Contracts—Section 2295 Kentucky Statutes.—In a suit to recover twelve months' rent from a tenant for continued occupancy after expiration of term, held, that there was such an express contract as to take the case out of Section 2295 Kentucky Statutes.
2. Contracts—Acceptance.—Where one in writing qualifiedly accepts a proposition for contract and subsequent conduct of the parties shows that both observed the contract as qualified, then there is such an acceptance by each as to make it an express contract.

AL. M. MARRET for appellants.

JACOB SOLINGER and JOHN RAMSEY for appellees.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

By virtue of a written rent contract the appellee became the tenant of appellant and took possession of

a certain business property in the city of Louisville June 1st, 1911. The term was two years, at the price of \$2,500 per annum, payable in advance monthly installments of \$208.33. The contract is voluminous, containing 13 clauses, and goes into great detail about the duties of the tenant in the occupancy and care of the property.

But the issue here is not as to the performance of that contract. The question is one of liability for continued occupancy after expiration of term. The appellant insists there never was an express contract for occupancy after the term expired, but, as appellee held possession for more than 90 days notwithstanding, he is, therefore, bound for a whole year under the provisions of Sec. 2295, Kentucky Statutes. She sues to recover the rent for 12 months, less the amount of payments for five months actual occupation. Appellee admits that he continued in possession for more than 90 days, in fact, for five months, but says it was by express contract, and that having complied with the new contract, and paid for the five months he occupied it, he is absolved from further liability.

The lower court took appellee's view of the matter and directed the jury to return a verdict accordingly. Hence the appeal.

During the two or three months just prior to the expiration of the term, there was considerable correspondence between the parties as to renewal and extension. The appellee desired an extension of the lease until some time in the fall of that year, and the appellant had refused to extend the lease for any time less than one year. It is admitted that up to May 30th—two days before the term expired—the parties were unable to reach any agreement, and the real point in the case is whether the correspondence and conduct of the parties from that date is of such a character as to constitute a new contract.

On May 30th the appellee wrote appellant the following letter, and attached to it a check for advance payment of the June rent:

"We have definitely concluded not to renew lease for the premises now occupied by us at No. 210 West Market street.

"We will, however, continue to occupy the store from month to month, and enclose herewith check for June rent."

Appellant accepted the check upon conditions stated in her response of June 3d, which is as follows:

"As I have been unable to secure a tenant for No. 210 W. Market street, I accept your check for June rent on the condition that you will vacate and deliver premises in accordance with expired lease within ten days after notice, and that the acceptance of your payments is not an acknowledgment that I agree to rent month by month, and again advise that you are occupying premises over my protest."

So far as the record discloses, there was no further correspondence between them until about the 1st of September, when appellee gave written notice that he would vacate the premises on October 31st. He did vacate on the date named. It is admitted that during these five months, and on the first of each, he made advance payments of the rents in the same manner as the original written contract required. As stated in appellant's letter of June 30th, she had been making efforts to secure another tenant, and she continued these efforts for some time afterwards by advertisements in the newspapers.

There can be no question as to the meaning of appellee's letter. His intention was to occupy the premises as a renter from month to month. But we are asked to decide which half of appellant's reply letter we will give effect. The first half recites the fact that she had been unable to secure a tenant, and that she accepted the check for June rent on condition that the tenant "will vacate and deliver premises in accordance with expired lease within ten days after notice." In the light of this portion of her letter, it is clear that she accepted appellee's proposition in the main, and that the tenancy became one of month to month, coupled with the obligation to use and care for the property as required by the original written contract. One additional obligation was imposed, viz., that possession would be given within ten days after notice. The original lease made no provision for ten days or any notice, and that fact makes it plain that the reference in the letter to the holding "in accordance with the expired lease," was not intended to obligate the appellee for the two years mentioned in the contract, or for any particular term. The evident purpose was to keep upon him the same restrictions as to the use and care of the property which

were stipulated in the original contract. After accepting the check on condition that he would so use and occupy the property, and surrender possession on ten days' notice, the last half of her letter proceeds to inform him that the first half does not mean what it says, and concludes with the positive statement that, notwithstanding the accepted check in payment for June rent, she protested against appellee occupying the premises. The last half of her letter is not only contradicted by the first, but her conduct during the subsequent five months conclusively shows that it was her purpose to obligate the appellee without binding herself in any way. The fact that she took no steps to vacate the property is evidence that the occupancy was not over her protest. The further fact that so long as appellee occupied it she did not give ten days' or any notice to vacate shows that she preferred to accept the checks on a month to month basis rather than have the property without a tenant.

It is unnecessary to consider whether one can accept benefits tendered with a proposition without at the same time accepting the proposition.

Appellant could not, of course, secure the right of occupancy by merely making a proposal for it, accompanied by a check for the first month's rent. It was his duty, under the contract, to vacate the premises at the expiration of his term, in the absence of a new contract. But, if appellant did not approve of his continued tenancy, or if, as she says, she protested against it, she should not have accepted his advance payments, and her remedy was a proceeding to evict him, rather than acquiescence in his holding. We are impressed that she, in fact, accepted his proposal, with a reservation that she might demand possession upon ten days' notice.

Appellee's proposal and her qualified acceptance of it, together with the conduct of both parties for the next five months, amount to an express contract as qualified and an acceptance by each. The effect of this contract was to permit the appellee to hold possession from month to month, and surrender same upon ten days' notice. As appellee complied with his contract in every particular, his liability is controlled by the contract—the statute applies only in the absence of a contract. We conclude that the judgment of the lower court was correct, and it is, therefore, affirmed.



**Leath v. Deweese.**

(Decided January 19, 1915.)

**Appeal from Carlisle Circuit Court.**

**Execution—Sale—Levy—Indorsement.**—The failure to endorse the levy upon the execution, or any paper thereto attached, invalidates the execution sale.

**JESS F. NICHOLS** for appellant.

**J. R. EVANS** and **BEN S. ADAMS** for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,**  
**COMMISSIONER—Affirming.**

Eb Deweese died intestate the owner of a tract of land in the county of Carlisle. On October 10, 1898, his daughter, Kate Jones, and Joe Deweese and others brought an action against Robert Partin and others, in which they alleged that they were the owners of certain undivided interests in the land left by their father, and asked for a partition. It was adjudged that Joseph Deweese was the owner of an undivided one-ninth interest in the land. Commissioners were appointed to partition the land and a track of seventeen acres was allotted to Joe Deweese. A judgment for costs was rendered against Joe Deweese and others who were parties to the suit. Having failed to pay his part of the costs, an execution for the sum of \$39.35, with interest, was regularly issued from the office of the circuit clerk. A sale of the land was had, and F. P. Leath became the purchaser at the price of \$49.00.

Joe Deweese brought this action against F. P. Leath to recover the seventeen acres which had been allotted to him in the division of his father's estate. Leath pleaded title by virtue of the foregoing proceedings. In his reply Deweese alleged that the proceedings were void for several reasons. Judgment was rendered in favor of Deweese, and Leath appeals.

While the execution sale is attacked on several grounds, we deem it necessary to consider only the question of the validity of the levy. In the case of *McBurnie v. Overstreet*, 8 B. Mon., 300, this court, in discussing the question of what elements were necessary to constitute a valid levy of an execution, announced the following rule:

"But we have had considerable difficulty in determining what acts of the officer should be deemed indispensable to constitute a valid levy of an execution upon real estate. No uniform rule or practice seems to have prevailed upon the subject. Our conclusion is, that the officer should either go upon or to the premises, and make an actual levy—or that he should see the defendant in the execution or his agent, and obtain his consent that the execution be levied upon the estate sought to be subjected—or that he should see and apprise the defendant or his agent of the particular estate upon which he designed levying, and should thereupon make an official and specific entry upon the execution, or upon a paper thereto attached, of the estates and levy. In the two first modes it would also be the duty of the officer to make the entry upon the execution."

The rule above announced was approved and followed in *Jones, &c., v. Allen & Co.*, 88 Ky., 381.

In the case under consideration no levy was endorsed on the execution, or upon any paper thereto attached. There being no valid levy, it follows that the sale was void. This rule does not conflict with the doctrine announced in *Guelot v. Pearce*, 38 S. W., 892; *Bell v. Weatherford*, 12 Bush, 508; *Reid v. Heastey*, 9 Dana, 324; where it is held that a failure of the officer subsequent to the sale to perform certain duties which were directory in their character cannot affect the rights of the purchaser. The levy must precede the sale, and a valid levy is essential to a valid sale.

Judgment affirmed.

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### **Commonwealth, By, etc. v. Intersouthern Life Insurance Company, etc.**

(Decided January 20, 1915.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, Second Division).

**Statutes—Construction—Effect of on Subsequent Cases.**—When a statute of the State has been construed by the Court of Appeals, such construction is conclusive in all subsequent cases to which the provisions construed must be applied.

MATT J. HOLT and A. SCOTT BULLITT for appellants.

BENNETT H. YOUNG and MARION RIPPY for appellees.

## OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This appeal is prosecuted by a revenue agent, in the name of the Commonwealth of Kentucky, from a judgment of the Jefferson Circuit Court, dismissing without prejudice, and at the cost of the relator, this action, which was brought against appellee for the purpose of recovering taxes on property alleged to have been omitted from assessment. In the opinion of the circuit court the dismissal of the action was authorized by Chapter 115, Article 2, Section 5, page 396, of the acts of 1912, because of the failure of the revenue agent to prosecute it with due diligence.

It is insisted for the appellant, and not denied by counsel for appellee, that the judgment is erroneous. In view of the construction given the act, *supra*, by us in Commonwealth v. Ewald Iron Co., 153 Ky., 116, decided since the judgment was rendered in the instant case, this contention must be sustained; and in the case of Commonwealth of Kentucky, by, etc., v. Standard Oil Co. of Ky., decided January 14, 1915, to be reported in 162 Ky., 149, a case on all-fours with the one under consideration, we found it necessary, under the ruling in Commonwealth v. Ewald Iron Co., *supra*, to reverse a similar judgment.

For the reasons indicated, the judgment is reversed and cause remanded for proceedings in conformity with the opinion in the Ewald case.

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**Josselson Brothers v. Butler & Lipsitz, etc.**

(Decided January 20, 1915.)

**Appeal from Pike Circuit Court.**

**Partnership—Insolvent Partnership—Attachment Against Property of—Fraud in Obtaining—How Attached Property Should Be Disposed of.**—Where, in an action against an insolvent partnership and the members of the firm, an attachment was levied upon the partnership property for an alleged debt sued on by the plaintiffs, and it was made to appear from the evidence that the plaintiffs were not, in fact, bona fide creditors, but silent partners in or part owners of the business and property of the defendant partnership, and that the action was brought and attachment procured for the purpose of defrauding actual creditors of the latter, the judgment of the circuit court dismissing the action and at-

tachment of the plaintiffs, and applying the proceeds of the attached property to the payment of the debts of other attaching bona fide creditors of the partnership, according to priority, properly determined the rights of the parties.

J. S. CLINE for appellant.

STATON & PINSON for appellee, Huffman.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

Prior to the second day of October, 1911, the appellee, R. T. Huffman, was engaged in the business of selling groceries and soft drinks in the city of Pikeville. On that day he sold to the appellee, Milt Butler, a one-half interest in this business at the price of \$400.00, for which he executed to Huffman his note, payable twelve months after date. The business was conducted by Huffman and Butler until October 11, 1911, when, by a written contract, the former sold his remaining interest in the business, which was one-half, to the appellee, Frank Lipsitz, the consideration being \$400.00 in hand paid, and Lipsitz endorsing and guaranteeing the payment of the balance of \$300.00 Butler then owed Huffman on the \$400.00 note executed by Butler October 2, 1911; \$100.00 having been paid on the note by Butler on the day Huffman sold his interest in the business to Lipsitz. The business was then conducted in the name of Butler & Lipsitz until the 27th day of November, 1911. On that day the appellants, Josselson Bros., a firm composed of F. R. Josselson and Alex. Josselson, doing business at Catlettsburg, Kentucky, having, as alleged, an account of \$385.80 against Butler & Lipsitz for merchandise claimed to have been sold them after November 11th, brought suit against them in the Pike Circuit Court to recover that amount; but it was later admitted of record that their account amounted to \$361.41 instead of \$385.80.

It was alleged in the petition that Butler & Lipsitz were insolvent, and were about to sell and convey, or otherwise dispose of, their property with the fraudulent intent to cheat and delay their creditors; that neither of them had any property in this State subject to execution, or enough thereof to satisfy the plaintiffs' demand, and that the collection of the demand would be endangered by delay in obtaining judgment and return of no property found. Upon the filing of the petition a sum-

mons and order of attachment were duly issued thereon, and duly served upon each of the defendants; and, on November 27, 1911, the attachment was levied upon the stock of goods and other property belonging to the firm of Butler & Lipsitz.

On November 27, 1911, but, following the institution of the action of the appellants, Josselson Bros., the appellee, R. T. Huffman, also instituted suit against Butler & Lipsitz, in the Pike Circuit Court, seeking to recover of them the balance of \$300.00 due on the \$400.00 note which Butler executed to him October 2, 1911. Josselson Bros. and members of the firm were also made defendants. Huffman's petition contained the same grounds for an attachment alleged in that of Josselson Bros., and he caused to be issued in his action a summons and order of attachment, both of which were duly served upon each of the defendants November 28, 1911; the attachment being at the same time levied upon the stock of merchandise and other property owned by the firm.

The petition of Huffman, after declaring on the note of \$400.00, less the credit of \$100.00, which had been executed to him by Butler, alleged that on the second day of November, 1911, he (Huffman) entered into a written contract with the appellants, Josselson Bros., who were then and are now engaged in the whiskey business in Catlettsburg, this State, whereby he, Huffman, agreed to sell to them on or before November 11, 1911, his one-half interest in the business of Huffman & Butler; and that on the 11th day of November, 1911, pursuant to the contract in question, he did sell to Frank Lipsitz, the nephew and agent of Josselson Bros., his one-half interest in the business and property of Huffman & Butler. That the consideration for this sale was \$400.00, which was cash in hand paid, and Josselson Bros. undertaking by Lipsitz to endorse and guarantee the payment of the note held by Huffman against Butler; that, though Lipsitz was named in the contract as the purchaser of Huffman's interest in the business and property of Huffman & Butler, the Josselson Bros. were the real parties in interest, but that the business was to be conducted for them by Lipsitz, their agent and trustee, in connection with Butler, as Josselson Bros. did not wish to be known to the public as partners therein; and that Butler, Lipsitz and the Josselsons then

agreed that \$20.00 per week should be taken out of the proceeds of Butler's one-half interest in the business by Lipsitz and paid over to Huffman on Butler's note until discharged; such payments and none of them were ever made.

It was, in substance, further alleged in the petition that the account for which Josselson Bros. sued Butler & Lipsitz was a bogus claim; that their action and the procurement and levy of the attachment therein were parts of a scheme resorted to for the fraudulent purpose of defeating Huffman in the collection of the note he held on Butler, in which both Butler and Lipsitz participated; and that for the purpose of executing such fraudulent intent, Frank Josselson, one of the firm of Josselson Bros., before entering the suit against Butler & Lipsitz, obtained from the latter the key to the store, took possession of the goods therein, and advised Lipsitz to board a train and leave the county and State with moneys which he had received in the course of the business, which advice Lipsitz immediately took and followed, carrying with him moneys received for the firm of Butler & Lipsitz which should have been appropriated to the payment of the firm's debts.

The appellants, Josselson Bros., filed an answer to Huffman's petition, traversing its affirmative matter, but neither Butler nor Lipsitz made any defense to either of the actions.

After the institution of the actions of Josselson Bros. and R. T. Huffman against Butler & Lipsitz, a third and similar action was brought against them by Hagen-Ratcliff & Company, a corporation of West Virginia, to which the appellee, R. T. Huffman, was also made a defendant, the object of which was to recover of Butler & Lipsitz an account of \$72.16 for merchandise which the plaintiff company had sold them. The defendants were all duly summoned to answer the petition. An order of attachment was also issued in that action, which was levied upon the merchandise and property of Butler & Lipsitz.

After the completion of the issues as stated, an order was entered taking for confessed, as to Butler and Lipsitz, the allegations of each of the petitions in the three actions filed against them. After the taking of proof, the three actions were consolidated and transferred to equity. By an agreed order, previously en-

tered, the stock of goods and other property levied on under the several attachments were sold by two receivers, who were directed to hold the proceeds until finally disposed of by judgment of the court. By agreement of the parties the consolidated causes were tried by Hon. A. E. Auxier, as special judge, who, upon the hearing dismissed the petition and attachment of Josselson Bros. at their cost, gave R. T. Huffman a personal judgment against Butler and Lipsitz for the amount due and interest on the note executed to him by Butler, sustained his attachment and awarded him his cost; also gave Hagen-Ratcliff & Company a personal judgment against Butler and Lipsitz for its account of \$72.16, with interest and cost, and sustained its attachment. But the court, being of the opinion that the claim of Hagen-Ratcliff Company was a debt owing by the firm of Butler & Lipsitz, and that of Huffman a debt owing by Butler and Lipsitz individually, held that the demand and attachment of Hagen-Ratcliff & Company was a prior lien upon the assets of the firm of Butler & Lipsitz, hence it was adjudged that the assets held by the receivers be first applied to the payment of Hagen-Ratcliff & Company's debt; and that what remained thereof be applied to the payment of Huffman's debt.

From that judgment Josselson Bros. have appealed.

Without discussing in detail the evidence found in the record, we think it abundantly justified the dismissal of the petition of the appellants, Josselson Bros. (1) If they were silent partners in and joint owners of the property and business operated and controlled by Butler & Lipsitz, as the weight of the evidence conduced to prove, they could not, even though their claim was a bona fide demand, as a matter of law, have obtained by their attachment, although first levied, priority over creditors of the firm. (2) The evidence introduced in support of their account does not, in our opinion, sustain its genuineness. On the contrary, the evidence, as a whole, convinces us of its spuriousness, for we think it shows that the appellants' claim was conceived when they ascertained that the business conducted by Butler & Lipsitz was unprofitable, and was planned to enable them to withdraw from the business the money they had invested in it and let whatever loss that might result fall on the creditors of the firm. (3) Fairly analyzed, the facts and circumstances furnished by the record

establish appellants' connection with and interest in the business of Butler & Lipsitz. The sale by the appellee, Huffman, of his half interest in the business of Butler & Huffman to Lipsitz for the appellants, Josselson Bros., is shown by the fact that Frank Josselson, of that firm, negotiated the sale after first taking the option for himself; that he employed and paid the draughtsman of the writing evidencing the sale; and that he paid to Huffman the \$400.00 purchase price agreed to be paid for his interest; and, in addition, guaranteed that Lipsitz would endorse the note which Huffman held upon Butler, and pay the \$300.00 due thereon out of the proceeds of the business to be conducted by Butler & Lipsitz, at the rate of \$20.00 per week. Moreover, Lipsitz was not seen by Huffman until the day he presented himself to make the purchase according to the terms of the contract theretofore agreed upon between Huffman and Frank Josselson, and, according to Huffman's testimony, the purpose of Josselson Bros. in using their nephew Lipsitz's name in the business was to avoid criminal prosecutions that might result from the selling of spirituous liquors in the business under the pretense of their being soft drinks. Huffman also testified that Lipsitz did not put a dollar of his own money in the business, but that Frank Josselson told him that the Josselson Bros. had put all the money in and that they were going to run it in Frank Lipsitz's name, and we have been unable to find in the depositions of the Josselsons any contradiction of this statement made by Huffman.

We also find in the record the deposition of Hawk Bishop, a witness introduced in behalf of appellees, who testified that he attempted to buy from Lipsitz his interest in the business, but was told by the latter that he could do nothing until he saw Frank Josselson. Thereafter the witness did see Frank Josselson, to whom he communicated what Lipsitz had said and with whom he then entered into negotiations for the purchase of the interest in question, and Josselson made no denial of his authority to make the sale. Huffman's testimony that the \$400.00 which he received for the interest sold Lipsitz was paid to him by Frank Josselson is corroborated by R. H. Cooper, one of appellants' attorneys.

It was also admitted by Milt Butler, to whom Huffman made the first sale of a half interest in the store



and business at Pikeville, that Frank Josselson had the keys, or one of them, to the store on the day the attachment of Josselson Bros. was levied; and that Josselson Bros. had agreed to assume responsibility for the payment of all fines that might be imposed against Butler and Lipsitz, or either of them, for any violations they might commit of the local option law, some of which fines were paid by Frank Josselson. Butler also admitted that he was paid \$25.00 in a draft on Josselson Bros. to make no defense to their action.

In the depositions given by them the two Josselsons and Lipsitz denied that the Josselsons had or at any time owned an interest in the business conducted in the name of Butler & Lipsitz; and, in general terms, also denied that there was any collusion between them to fraudulently appropriate the money and property of the business conducted in the name of Butler & Lipsitz for the purpose of cheating the latter's creditors, but they were in all material matters contradicted and their testimony overthrown by the weightier evidence furnished by the appellee Huffman and his witnesses, which, in addition to showing the interest of Josselson Bros. in the business of Butler & Lipsitz, also fairly proved that the motive inducing them to make the purchase of that interest from Huffman was the profit they expected to derive from the illegal sale of their liquors in Pikeville and Pike county under color of the soft drink business; and also that their motive in bringing the suit against Butler & Lipsitz and attaching the goods and property under their control, was to recoup themselves for such losses as had been sustained by them in the business, at the expense of the creditors of the so-called firm.

In brief, we think the special judge had ample grounds for dismissing the petition of the appellants, Josselson Bros., as the fraudulent character of their claim was fully established by the evidence; and, as we are further of the opinion that he properly determined the rights of the appellees, Huffman and Hagen-Ratcliff & Company, as between them and against Butler & Lipsitz, the judgment is affirmed.

**Big Sandy Company v. Ramey, et al.**

(Decided January 20, 1915.)

**Appeal from Pike Circuit Court.**

1. **Deeds—Deed by Married Woman—Failure of Husband to Join—Possession.**—Where a married woman executes and delivers a deed to her lands in which her husband does not join, and puts the vendee in actual possession, it is void so far as it attempts to convey title, but it is sufficient to show the nature and extent of the possession of the vendee under the deed, and where he enters upon a tract of land under such deed, and claims to the extent of the boundaries of it, he becomes possessed of the whole so far as it is not adversely held by others.
2. **Adverse Possession—Deeds—Married Women.**—Where one is in possession of a tract of land under a deed from a married woman, in which her husband did not join, and claims the land under such deed, his possession is adverse to her as soon as she becomes discoverd by the death of her husband.
3. **Limitation of Actions—Conveyance by Married Woman—Champerty.**—While one is holding land conveyed to him by a married woman by a deed in which her husband did not join, a conveyance made by her of such lands to another, after she becomes discoverd, is champertous and void and does not stop the running of the statute of limitation in favor of the one holding the land adversely.
4. **Limitation of Actions—Conveyance by Married Woman.**—If a married woman ineffectually attempts to convey her lands by the execution and delivering of a deed, in which her husband did not join, and puts the vendee in possession her right of recovery of the land is barred unless she brings an action within three years after she becomes discoverd.
5. **Adverse Possession.**—One holding under a deed purporting to convey a tract of land to him is in possession of the mineral products of said land, unless the holding of the minerals has theretofore been separated from the surface of the soil by a previous conveyance.

J. J. MOORE for appellant.

CHILDERS &amp; CHILDERS for appellee.

**OPINION OF THE COURT BY JUDGE HURT—Affirming.**

In the year 1876 Berry Ramey bought from George W. Spears a tract of land in Pike county, Kentucky, containing about three hundred (300) acres, and paid him for it by conveying to him another tract of land. Thereafter, or before Berry Ramey had secured a deed from

Spears for the land, he died. On October 21, 1876, George W. Spears conveyed this tract of land to Mazy C. Ramey, the widow of Berry Ramey. Before this conveyance was made to her, however, she had remarried, and had married one Lewis Elswick. On the 12th day of December, 1887, Mary C. Elswick (later Ramey) made a deed to the Virginia Mining and Improvement Company, by which she conveyed to them the coal and minerals upon a part of this land, but the extent of that deed, and the number of acres embraced in it, and extent of the minerals that were conveyed to them by that deed, does not appear, as the deed is not in the record. On the 29th day of March, 1897, Mazy C. Elswick made a deed to her son, Calvin Ramey, by which she conveyed to him the entire body of land, which had been conveyed to her by George W. Spear, and in which she made no reservation or exception on account of the coal, oil, gas, or any minerals, which she had theretofore conveyed to any one else in said land.

Calvin Ramey was at that time living in a house upon the land with his family, and, after receiving this deed from his mother, continued to live upon the land until the present time. At the time Mazy C. Elswick conveyed this land to Calvin Ramey she was then a married woman, living with her husband, Lewis Elswick, who did not join in the deed to Calvin Ramey. It appears, however, that he did join in the deed made by her to the Virginia Mining and Improvement Company on the 12th day of December, 1887. Lewis Elswick died in 1903 or 1904.

After the death of Lewis Elswick, and on the 9th day of March, 1912, Mazy C. Elswick made a special warranty deed to the Big Sandy Company, by which she conveyed to them all of the coal and other minerals in, upon, and under the entire tract of land, which she had theretofore, on March 29th, 1897, conveyed to Calvin Ramey.

On the 3rd day of June, 1912, Calvin Ramey filed his petition in equity against the Big Sandy Company, in which he alleged that he was the owner and in the actual, adverse possession of the entire tract of land, and that Mazy C. Elswick, his vendor, had made a deed to the Big Sandy Company, in which she had conveyed to it the coal, oil, salt waters, gases, and other mineral products in said land, and that the Big Sandy Com-

pany was now claiming to own said mineral products by virtue of the said deed, and that same was a cloud upon his title and the vendable value of his land, and prayed that this deed be canceled and adjudged to be void. The Big Sandy Company filed an answer in which it admitted the ownership and actual possession of the surface of the land described in the petition to be in the plaintiff, Calvin Ramey, but denied that he was the owner of the coal, salt waters, gas, oil and other minerals in said land, and denied that the deed made to it by Mazy C. Elswick casts a cloud upon Calvin Ramey's title to said land or injured its vendible value, and in the second paragraph of its answer it claimed to be the owner of the coal, salt waters, oils, gas, and minerals in said land, and had been long before the execution of the deed to it by Mazy C. Ramey on March 9, 1912, and alleged that the plaintiff, Calvin Ramey, was claiming to be the owner of the mineral products in said land, and was thereby casting a cloud upon its title, and asking that same be quieted. Calvin Ramey filed a reply to said answer in which he traversed all of the affirmative allegations in it. Thereafter Mazy C. Elswick filed her petition to be made a party to said suit, in which she claimed that the Big Sandy Company, through its agent, N. A. Ramey, had procured her to execute the deed to the Big Sandy Company on March 9, 1912, by fraudulent representations to her, and joined in the prayer of Calvin Ramey that the deed be canceled. The petition was afterwards filed in court without objection, and by agreement of parties the affirmative allegations in it were considered as controverted upon the record. Calvin Ramey submitted deeds showing a continuous title from the Commonwealth of Kentucky for the land, down to Mazy C. Elswick. Evidence was submitted by both parties upon the issue as to fraud in the procurement of the deed by the Big Sandy Company on March 9, 1912.

Calvin Ramey also testified and submitted other evidence conducing to show that he had been in the adverse possession of the land, claiming to own it all to the extent of the boundaries of his deed from Mazy C. Elswick to him dated March 29, 1897, until the bringing of this suit. He also filed another deed from Mazy C. Elswick to him for the land, executed January 7, 1913, after

the filing of this suit, Lewis Elswick, her husband, having died before the execution of the last named deed.

The Big Sandy Company submitted evidence conducing to show that Calvin Ramey had never claimed at any time to be the owner of the coal, oil, gas, and other mineral products that were contained in the land.

The Big Sandy Company did not produce any deeds showing any title to it of any of the mineral products in the land, except the deed from Mazy C. Elswick to it, dated March 9, 1912. While Calvin Ramey, in his testimony, stated that he had information that his mother, Mazy C. Elswick, had at some time or other made a deed to some one conveying the mineral products that were in a part of the land in controversy, and while Mazy C. Elswick, in her testimony, said that she had made a deed at some time or other by which she conveyed the mineral products in the land to some one. Neither does any other witness in the case seem to know to whom said deed or such a deed was executed.

Upon the case being submitted the circuit court adjudged that the deed executed by Mazy C. Elswick to the Big Sandy Company, dated March 12, 1912, was void, and that same is a cloud on the right and title of Calvin Ramey to so much of the mineral rights and estate conveyed in the deed as were not included in the deed made by Mazy C. Elswick and her husband, Lewis Elswick, to the Virginia Mining and Improvement Company, dated December 12, 1887, to a portion of the land in controversy, and that the deed from Mazy C. Elswick to the Big Sandy Company, to the extent indicated, be set aside and canceled, and furthermore adjudged that Calvin Ramey had no right or title to the mineral rights or privileges which were acquired by the Virginia Mining and Improvement Company in so much of the tract of land as was set forth and described in the deed to it by Mazy C. Elswick and her husband, Lewis Elswick, on December 12, 1887.

The appellant, Big Sandy Company, took exceptions to this judgment, and from it has appealed to this court. Calvin Ramey, who is the appellee here, and the plaintiff below, has not appealed.

This court has often held that where one holding a patent, deed, or title bond for a boundary of land, and claiming to the extent of the boundaries of the deed, patent, or title bond, under which he holds, is in possession

of the whole land included in the writing so far as it is not adversely held by others. (*McLaurin v. Salmons*, 11 B. M., 96; *Beeble v. Coy*, 9 B. M., 312; *Smith v. Lockridge*, 3 Littell, 19; *Jones v. Childs*, 2 Dana, 25; *Fox v. Hinton*, 4 Bibb, 559.)

While the deed executed by Mazy C. Elswick to Calvin Ramey on the 29th day of March, 1897, was void and did not divest her of title, because she was at that time a married woman, and her husband did not join in the deed, it is yet sufficient to show the nature and the extent of the possession of Calvin Ramey.

This court has often held that where one enters upon a tract of land under a parol purchase or gift, and holds by actual, open possession, claiming it as his own, such possession is adverse and limitation runs from that date. (*Comth. of Ky. v. Gibson*, 85 Ky., 666; *Wells v. Head*, 12 B. M., 156.)

While there is some evidence conducing to show, by the witness N. A. Ramey, that Calvin Ramey did not claim, under the deed from his mother, the ownership of the minerals in the land, this evidence is contradicted by other evidence conducing to show that he claimed to be the owner of the entire tract of land, and of all of the mineral products in it, except in that portion of the land which had theretofore been conveyed to the Virginia Mining and Improvement Company, by deed of December 12, 1887. It is conceded that the deed from Mazy C. Elswick and her husband to the Virginia Mining and Improvement Company did not embrace all of the land, but only about one-half of it, and at the time Calvin Ramey took possession of the land, under the deed from his mother on the 29th day of March, 1897, there is no evidence to show that he did not intend to claim and to hold the surface of all of the land and the mineral products in all of the land, except that portion which was embraced in the deed to the Virginia Mining and Improvement Company.

The possession under a general warranty deed of a tract of land is the possession of all of the elements of the land and of everything underneath the surface, unless the mineral products have theretofore been separated from the ownership of the surface by previous conveyance. It might be insisted that the deed from Mazy C. Elswick to Calvin Ramey of March 29th, 1897, being void by reason of the fact that the husband of

Mazy C. Elswick did not join with her in the deed, would render the possession of Calvin Ramey under said deed amicable and not adverse to the title of his mother.

In the case of Bankston, &c., v. Crabtree Coal Mining Company (95 Ky., 455), a case wherein the husband of a married woman had conveyed the wife's land to one Woodruff, and in which deed the wife only joined in the attesting clause and only relinquished her dower in the land, this court used the following language:

"It is evident that the entry of Woodruff was hostile to the title of the female appellant, and his holding adverse to her. But for her disability she could have asserted her cause of action immediately upon his entry."

The case of O'Dell v. Little (82 Ky., 146) was a case wherein a married woman had conveyed her lands to another, and her husband did not join in the deed, except to sign it, his name at no place being mentioned in the deed as a conveying party, and the vendee took possession under the deed, this court held that the possession of the vendee was adverse to the married woman and all others, from the beginning of the possession, because the right of entry by the vendor and her husband existed at the date of the possession and continued thereafter without interruption until barred by the statute of limitations. It seems that, although the holdings of one under the deed of a married woman, in which her husband did not join, is adverse to the woman, such adverse holding does not militate against her right to recover the lands until her disability of coverture has been removed for three years. The right of entry of Mazy C. Elswick upon the land in controversy existed from the day of the execution of her deed to Calvin Ramey; his possession was open, notorious, and visible, and has so continued until the present time.

There is no legal impediment to a married woman maintaining an action for the recovery of her real estate, and since the enactment of Section 2128 of the Kentucky Statutes, in 1894, she can do so without joining her husband with her, and the statute of limitations tolling one's right to maintain an action for the recovery of real estate, adversely held, after fifteen years, is only prevented from barring her right of recovery in such a state of case by the provisions of Sections 2506 and 1510 of the Kentucky Statutes.

Section 2506, *supra*, provides: "If at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, the such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

Section 2510, *supra*, provides: "If a woman, after she arrives at the age of twenty-one years, joins with her husband in the conveyance of her lands or chattels real, and acknowledges the conveyance before an officer authorized to take her acknowledgment of the conveyance, no action shall be brought by her for the recovery of lands or chattels real mentioned in such conveyance, unless the action is commenced by her within three years after she becomes discover, etc."

Construing the two sections, *supra*, and Section 2505 of the Kentucky Statutes, together, it seems that no action can be brought for the recovery of real property unless it is brought within fifteen years after the right to institute the action first accrued, but if at the time a right to institute an action for the recovery of real property first accrued to a woman, she is then married, she or the person claiming through her, may maintain the action within three years after her coverture is removed, although more than fifteen years may have expired since the accrual of the right of action, but if a married woman, who is twenty-one years of age, join with her husband in the conveyance of her lands, and acknowledges the conveyance before an officer who is authorized to take her acknowledgment to the conveyance, she cannot maintain an action for the recovery of the lands mentioned in the conveyance after three years from the time she becomes discover. It seems that the law-making power has fixed a difficult period of limitations to the right of married women, twenty-one years of age, and who have attempted by a conveyance which is ineffectual to pass her title to her lands, to maintain an action for their recovery, from that class of them who are under twenty-one years of age, and who have made no effort to convey the lands which they seek to recover. Hence this court, in the case of *Bankston v. Crabtree, et al.* (95 Ky., 455), held that where a married woman attempted, but ineffectually, to convey her inter-



est in lands, that she could not maintain her action for the recovery of the lands unless the action was instituted within three years after the death of her husband. In the case of *Stephens v. McCormick* (5 Bush) this court said: "That if the married woman joined with her husband in the conveyance, and after his death sought to recover the land sold, because the conveyance was defective as to her and ineffectual to pass her title, that she must sue within three years from the removal of her coverture.

In *O'Dell v. Little*, *supra*, where the married woman alone conveyed, her husband joining in the deed only by signing it, and it being ineffectual to pass title, this court said: "The entry was under the wife with the claim of an absolute title against both (husband and wife), and therefore the action must have been brought within three years after the husband's death, etc."

There is no doubt that Mazy C. Elswick was above twenty-one years of age when she executed the deed to Calvin Ramey, dated March 9, 1897, and that she acknowledged it before an officer authorized to take her acknowledgment, and that she intended by the deed to vest the title to the lands in Calvin Ramey, and put him into the possession of the land under the deed. The deed was ineffectual to convey her title, and we see no substantial reason between the principle which ought to prevail in this case, where the husband did not attempt to join in the deed, and the case of *O'Dell v. Little*, where he ineffectually attempted to join in the deed, and applying the provisions of Section 2510, *supra*, to this case, Mazy C. Elswick's right of entry upon the lands in controversy was barred several years before she executed the deed to appellant, which is sought to be canceled in this case. She became discoverd in 1903 or 1904, and she executed the deed to the Big Sandy Company in 1912. It follows, then, that at the time she executed the deed complained of by appellee, Calvin Ramey was then in the notorious, open, and visible possession of the land in controversy, holding adversely to every one under a deed of record, and since Mazy C. Elswick had failed for three years after she became discoverd to claim her right of entry upon the lands, his title had become complete to the lands.

Section 210 of the Kentucky Statutes provides:

“That all sales or conveyances, including those made under execution, of any land, or the pretended right or title to same, of which any other person at the time of such sale, contract or conveyance, has adverse possession, shall be null and void.”

It appearing that the deed from Mazy C. Elswick to the appellant, Big Sandy Company, having been executed at a time when the lands and the minerals in that portion of it not conveyed by the deed of December 12, 1887, to the Virginia Mining and Improvement Company, were in the adverse possession of the appellee, Calvin Ramey, the deed to the Big Sandy Company was champertous and void, so far as it undertook to convey to the Big Sandy Company the mineral products in that portion of the land not conveyed by the deed to the Virginia Mining and Improvement Company. No title passed to the Big Sandy Company by reason of such deed to the minerals in the land not embraced by the deed to the Virginia Mining and Improvement Company. The deed to the Big Sandy Company being void, and no actual possession held under it, it did not stop the running of the statute of limitations in favor of the possession of Calvin Ramey, which continued despite said deed, and matured his title before the bringing of this suit, even if the fifteen year statute applied in this case, instead of Section 2510, *supra*.

The Big Sandy Company claims that it is a remote vendor of the Virginia Mining and Improvement Company, and that when Mazy C. Elswick and her husband, Lewis Elswick, sold the mineral products in the land, that they undertook to convey to the Virginia Mining and Improvement Company all of the minerals embraced in all of the land, but, as said before, the appellant even fails to show that it is a vendee, either near or remote, of the Virginia Mining and Improvement Company, and fails to show its contention to be true that the minerals in all of said land were sold in 1887, for it is insisted that the deed sought to be canceled herein was made to correct the failure of the deed of December 12, 1887, to the Virginia Mining and Improvement Company, to embrace the minerals in all of the land. It appears from the evidence that there is about three hundred acres of land, and that the sale to the Virginia company was made at seventy-five (\$0.75) cents per acre, and the total amount which Mazy C. Elswick received for it was

\$155.00, which shows very clearly that the representatives of the Virginia Mining and Improvement Company did not at that time understand that they were buying minerals in all of this land, but in only about two hundred acres of it.

The deed sought to be canceled expresses a consideration of \$1.00 and other valuable considerations, and seems to have been procured from Mazy C. Elswick, who is an old and uneducated woman, by giving to her ten dollars in money to execute it, through the influence of her nephew, N. A. Ramey, who was paid fifty dollars by the Big Sandy Company to procure her signature to the deed, and whom she testifies represented to her that the Childers boys were going to sue Calvin Ramey and take the coal and minerals in the land away from him, if she did not sign the deed, and who carefully concealed from her the fact that her deed made to the Virginia Mining and Improvement Company in 1887 only embraced about one-half of the land to which he was trying to induce her to make a deed to the Big Sandy Company, and that she was induced by said representations to execute the deed to the Big Sandy Company. At the time the deed was made to the Virginia Mining and Improvement Company it appears that she was then living in the State of West Virginia, and that the transaction was conducted by one Moses Ramey.

It is true that N. A. Ramey contradicted the statements of Mazy C. Elswick as to how she was induced to sign the deed, but the chancellor below heard and considered all of this evidence, and we are not able to say that the evidence is not sufficient for him to base his opinion upon, that the deed ought to be canceled for fraud as well as for champerty.

It is, therefore, adjudged that the judgment appealed from be affirmed.

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### Cherry, et al. v. Cherry, et al.

(Decided January 20, 1915.)

#### Appeal from Simpson Circuit Court.

1. **Land—Joint Owners—Division.**—Where a joint owner of land which is in possession, desires it, the other joint owners must submit to a sale of it, if the shares are worth less than \$100.00 per share, or if it cannot be divided without materially impairing

its value as a whole, or the interest of the ones desiring the sale; but if the shares are worth more than \$100.00 a share and it can be divided without materially impairing the value of it, or the interest of the ones desiring it, the other joint owners must submit to a division of it.

2. Land—Division—Burden of Proof.—Prima facie, a tract of land containing 159 acres may be divided into three parts of equal value without materially impairing its value, or the value of either interest therein, and the burden of proof is upon the party contending that it is not divisible.
3. Pleading—Answer and Counter Claim—Caption.—An answer and counter claim should be so denominated in the caption, but if the opposing party joins issue upon it, without objection, the defect is waived, and if the pleadings state facts constituting it a counter claim, it will be considered, although it is not so denominated in the caption.

JOHN J. MILLIKEN for appellants.

WHITESIDES & HOBODY for appellees.

#### OPINION OF THE COURT BY JUDGE HURT—Reversing.

The appellants, Ann Cherry and Laura Cherry, filed their petition in equity in the circuit court against John W. Cherry, Mrs. John W. Cherry, and Seymour Smith, in which they alleged that they and John W. Cherry were the joint owners, and in actual possession, of a farm containing 159 and a fraction acres. Ann Cherry, Laura Cherry, and John W. Cherry each owned a one-third undivided interest in said farm. It also appears from the petition that this farm was purchased by the Cherrys from one J. A. Elliott, and for which they paid and were to pay the sum of \$4,729.26, and that Ann Cherry and Laura Cherry had fully paid their part of the said purchase price and that John W. Cherry had paid only \$510.66 of his one-third part of the purchase price, and that he yet owed the sum of \$1,100.00; that the vendor had a lien on all of the land to secure the full payment of the unpaid note, and that Ann Cherry and Laura Cherry were the sureties of John W. Cherry upon the note and that his one-third interest in the land was amply sufficient to pay all of the note in full. The note had been transferred by J. A. Elliott to Seymour Smith, who is now the owner of it.

The plaintiffs alleged that the farm cannot be divided without materially impairing its value, and the value of the interest of each of the plaintiffs therein.

They filed the deed from J. A. Elliott to them, and John W. Cherry, conveying this land to them, with the petition. They prayed in their petition that Seymour Smith be required to set up his lien, and enforce it against the one-third interest in the land owned by John W. Cherry, and asked for a sale of the land and for a division among the parties entitled to it.

John W. Cherry filed an answer in which he alleged that he and Ann Cherry and Laura Cherry are the owners and in possession of the tract of land mentioned in the petition, and also alleged that since the filing of the suit he had paid off to Seymour Smith the balance of the purchase money due on said land, and had secured the release of the vendor's lien upon the land to secure the payment of the note. He also denied that the land can not be divided without materially impairing its value or the value of the interests of either of the plaintiffs therein, and asked that his one-third interest in value in the land be cut off and allotted to him. His answer, by agreement of parties, was taken as controverted of record. The defendant, Seymour Smith, did not appear nor file any answer in the case.

The parties took the depositions of numerous witnesses on the question as to whether or not the land could be divided without material injury to it as a whole, or to the interests of the plaintiffs, but the court was not enlightened by any proof as to whether or not John W. Cherry had paid off the note for the balance of the purchase money on the land, or had secured the release of the vendor's lien for the payment of the purchase money upon the land.

The caption of the answer of John W. Cherry does not contain the word counter-claim, but his answer is in all its essential allegations a counter-claim against Ann Cherry and Laura Cherry, the plaintiffs, and they waived their right to object to the pleading because it was not designated in the caption as an answer and counter-claim, by agreeing of record to take the affirmative allegations in it as controverted and making an issue thereon. The pleading of John W. Cherry is not a cross-petition as denominated by counsel for appellants, because a defendant cannot have a cross-petition against a plaintiff. (Civil Code, Sect. 96; Grimes v. Grimes, 88 Ky., 20.)

The case was submitted in the court below and resulted in a judgment dismissing the entire action, without granting any of the relief sought by either party, and to this judgment Ann Cherry and Laura Cherry excepted, and John W. Cherry also excepted, and the case now comes to this court upon the appeal of Ann Cherry and Laura Cherry, and upon a cross-appeal of John W. Cherry.

The petition contains all of the allegations necessary to make a good cause of action, under Section 490, Subsection 2, of the Civil Code, and under said section the parties who jointly own real estate and are in possession of same, can be required, at the suit of one of the joint owners, to submit to either a division of the land, if the share of each owner be worth more than \$100.00, and the property can be divided without materially impairing its value or the value of the plaintiff's interest therein; or to a sale of the property, if the share of each owner is worth less than \$100.00, or the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest in it.

It seems from the record that the chief question to be determined is, as to whether the land should be sold as a whole, and the proceeds divided between the joint owners, paying out of the interest of John W. Cherry the balance yet due upon the land of the purchase money, or whether the land should be divided between the joint owners and a lien declared to be upon the portion allotted to John W. Cherry to secure the payment of the balance of the unpaid purchase money. In the case of *McFarland v. Garnett, &c.* (10 R., 91) this court, in regard to a division of a tract of 106 acres of land, used the following language:

"Undoubtedly a tract of land containing as many as 106 acres may be divided without materially impairing its value. *Prima facie*, it is divisible without materially impairing its value, and the burden of proof is on the party contending contrariwise." In the case, *supra*, the division mentioned was a division in two parts of a tract of land, 101 acres in one part and 5 acres in another. In this case the division sought is a division into three equal parts, as to value, and the tract of land contains 159 acres and a fraction of an acre. *Prima facie*, such a division can be had of this tract into three equal parts as to value, without materially impairing the value of

the tract of land as a whole, or either one of the portions into which it may be divided. Sub-section 7 of Section 494, of the Civil Code, provides: "All persons interested in the property must be made parties; and if objection to the sale be made by the defendant having a joint interest, his share shall not be sold, but the property may be divided and a sale of the share of those desiring it may be ordered, if such division and sale can be made without materially impairing the value of the property or of the plaintiff's interest therein." In this case John W. Cherry asks that his share of the land be allotted to him, and alleges in his answer and counterclaim that such a division can be made without materially impairing the value of the property or the interest of Ann Cherry or Laura Cherry therein. The burden of the proof in a case of this kind is clearly upon the ones asking a sale of the property as a whole, to show that a division of it cannot be had without materially impairing its value, or the value of his or their interests.

The plaintiffs, Ann Cherry and Laura Cherry, submit the testimony of fifteen witnesses, in addition to the testimony of Ann Cherry, thirteen of which witnesses state that it is their opinion that the land cannot be divided so as to allot to John W. Cherry his interest in it without materially impairing its value, and the value of the interests of Ann Cherry and Laura Cherry, but no one of these witnesses gives any sufficient reasons upon which he bases his opinion that a division of the land would have the effect that he insists upon. The chief and only reason which they give is, that some portions of the land are more fertile than other portions of it, but this should not be any obstacle to competent commissioners in dividing the land, or allotting to each one his share in value. While John W. Cherry, in addition to himself, submits the evidence of seven witnesses, each of whom testifies that in his opinion the land could be divided by allotting to John W. Cherry his interest in value in it without impairing the value of the tract or the interest of either Ann Cherry or Laura Cherry in it. The proof also shows that the farm is situated alongside of a public highway, which runs alongside of one side of it for about one mile or more.

Taking all of the evidence into consideration, it seems that Ann Cherry and Laura Cherry have failed to demonstrate by proof that a division of this tract of land would result in any material impairment of the value of

the tract as a whole, or of the interest of either of them in it.

Ann Cherry and Laura Cherry being sureties of John W. Cherry upon his note, as is alleged in the petition, and not denied, they had a right to maintain an action against him to require payment of the note, and, as same was a lien upon the land, to require Seymour Smith to enforce the lien, and to have John Cherry's interest in the land subjected to the payment of the note, before their interest in the land should be subjected to its payment.

It is, therefore, adjudged that the judgment in this case be reversed, both upon the original and cross-appeal, and that it be remanded, with directions to the court below to render a judgment that the interest of John W. Cherry be allotted to him in said land, and that commissioners be appointed for that purpose. The court should also adjudge that the owner of the balance of the unpaid purchase money note has a lien upon all of the shares in the land to secure the payment of said note, but that the portion allotted to John W. Cherry is primarily liable for it, and the interest of Ann Cherry and Laura Cherry can only be subjected to the payment of the portion, if any, remaining unpaid after the portion in the land of John W. Cherry is exhausted. The owner of said note should be required by proper proceedings to either release Ann Cherry and Laura Cherry, and the lien upon their shares, in the land from the payment of said note, or else proceed forthwith to enforce the collection of the note. After the allotment to John W. Cherry of his one-third in value of the land, the court should then decree the sale of the remaining shares, or a division of same between appellants as the owners may still desire.

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### **Veal v. Commonwealth.**

(Decided January 20, 1915.)

#### **Appeal from Calloway Circuit Court.**

1. **Criminal Law—Trial—Misdemeanor—Absence of Defendant.**—A defendant in a misdemeanor case may be tried in his absence, where his failure to appear is his own voluntary act, and does not grow out of a denial of that right.
2. **Criminal Law—Continuance—Grounds—Sickness of Accused.**—Where the Commonwealth permits the accused at the first call-



ing of his case to show without contradiction that he is too sick to be present or to manage his defense, he is entitled to a continuance so as to give him an opportunity to exercise his constitutional right of being present at the trial, and the probability of the absence of the principal witness for the Commonwealth if a continuance was granted could in no way affect this right.

JOHN RYAN for appellant.

JAMES GARNETT, Attorney General, and DENNY P. SMITH, Commonwealth's Attorney, for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Appellant, Gussie Veal, was arrested on a warrant from the Calloway County Court, charging him with violating the local option law by selling whiskey to J. Wavil Wade. He was convicted in that court and fined \$65. From the judgment of conviction he appealed to the circuit court, where he was again adjudged guilty and his fine fixed at \$100. From that judgment this appeal is prosecuted.

The principal error relied on is the failure of the trial court to grant a continuance. When the case was called in the circuit court, appellant filed the affidavit of a reputable physician, who stated that he had examined appellant, and that he was confined to his room with malarial fever, and was unable to be present at the trial. This affidavit was supplemented by the affidavit of appellant, who stated substantially the same facts, and also the facts to which he would testify if present. The Commonwealth did not undertake to controvert the statements contained in these affidavits with reference to appellant's illness, but filed a counter-affidavit to the effect that the principal prosecuting witness, who was a resident of Tennessee, was confined in jail at that time; that if the case was continued beyond the August term his sentence would expire and he would return to his native State, and would not be present at the trial; that a conviction could not be secured without the testimony of this witness. On this showing, the trial court refused a continuance, and permitted appellant's affidavit to be read as his deposition.

It is true that a defendant in a misdemeanor case may be tried in his absence, where his failure to appear is his own voluntary act and does not grow out of a denial of that right. Criminal Code, Sec. 184; Common-

wealth v. Cheek, 1 Duvall, 26; Walston v. Com., 106 S. W., 224, 32 Ky. Law Rep., 535. However, there is a broad distinction between such a case and a case like that under consideration, where the accused desires to be present and insists on that right. The Constitution provides:

"In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." Constitution, Sec. 11, Bill of Rights.

It will thus be seen that the right of the accused to be heard by himself and counsel, and to meet his witnesses face to face is not a mere formal right which may be dispensed with without prejudice to the accused, but is a substantial right granted by the Constitution itself, and should not, therefore, be denied. It will not do to say that the accused was guilty, and was, therefore, not prejudiced. His guilt was a question for the jury and not for the court, and on the question of his guilt he had the undeniable right to be present and be heard by the jury. This is not a case where evidence pro and con on the question of appellant's illness was heard by the trial court, and it cannot be said that, under the facts presented, there was no abuse of discretion in refusing to grant the continuance. It is a case where the evidence introduced by the appellant on the question of his illness was not controverted by the Commonwealth. His right to a continuance depended alone on his illness, and inability to be present, and the probability of the absence of the principal witness for the Commonwealth if a continuance was granted could in no way affect the right to a continuance if, as a matter of fact, appellant was sick and unable to be present at the trial.

In the recent case of Ehrlich v. Commonwealth, 131 Ky., 680, the court said:

"When the Commonwealth permits a defendant, at the first calling of his case, to show, without contradiction, that he is too sick to be present or to manage his defense, then we think he is entitled to a continuance of the case, so as to give him an opportunity to exercise his constitutional right of being present at the trial, to confront the witnesses who accuse him, and to hear their testimony."

The facts of this case bring it within the rule above announced, and we, therefore, conclude that the trial court erred to the prejudice of the appellant in refusing the continuance asked for.

Judgment reversed and cause remanded for new trial consistent with this opinion.

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### **Falls City Construction Company v. Fiscal Court of Wolfe County.**

(Decided January 20, 1915.)

Appeal from Wolfe Circuit Court.

CHARLES CARROLL and M. M. LOGAN for appellant.

S. MONROE NICKELL, G. C. ALLEN and IRA M. NICKELL for appellee.

RESPONSE BY CHIEF JUSTICE MILLER—Overruling petition for rehearing.

The opinion inadvertently stated that the second installment of \$2,500.00 for the building of Stage "A" of the court house was due appellant and should be paid. (160 Ky., 623, 636.)

The first contract was valid and the first payment of \$3,500.00 was properly paid; but the remaining \$2,500.00 will not be due until Stage "A" shall have been finished. As that has not been shown by the record, the clause in the opinion on page 636 reading, "and the second installment of \$2,500.00 for the building of Stage 'A' is due the appellant, and should be paid out of the insurance money on hand and set apart for that purpose," is withdrawn.

Petition for a rehearing overruled.

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### **Louisville & Nashville Railroad Company v. Mitchell.**

(Decided January 21, 1915.)

Appeal from Knox Circuit Court.

1. Carriers—Action Against for Injury to Passenger or His Property—Jurisdiction.—Under Section 73 of the Civil Code of Prac-

tice an action against a carrier for injury to a passenger or his property must be brought in the county in which the carrier resides, or in which the passenger or his property is injured, or in which he resides, if he reside in a county into which the carrier passes; and by Section 83 of the Code several causes of action may be united if each affect all the parties to the action, may be brought in the same county and may be prosecuted by the same kind of action.

2. **Action—Misjoinder—Practice.**—The question of a misjoinder of actions may be raised by a motion, under Section 85 of the Civil Code of Practice, to require the plaintiff to elect which of the actions he will prosecute.
3. **Pleading—Demurrer.**—A demurrer to a petition cannot enlarge the allegations of the petition by reciting extraneous facts in the demurrer.
4. **Jurisdiction—Pleading—Demurrer.**—Where a petition stated three causes of action, one of which could be maintained in the county wherein the action was brought, a special demurrer to the jurisdiction was properly overruled, because the court had jurisdiction over one of the causes of action stated in the petition.
5. **Domicile—Residence.**—Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation; it does not include as much as domicile, which requires an intention combined with residence.
6. **Domicile—Residence.**—One may seek a place for the purpose of pleasure, or business, or of health; if his intent be to remain, it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence.
7. **Negligence.**—Under a general allegation of negligence, any negligence may be shown; but where specific acts of negligence are relied upon, they must be proved as alleged to sustain a recovery.
8. **Carriers—Passengers—Injuries to.**—A carrier is responsible for injuries received by a passenger in the course of his transportation, which might have been avoided or guarded against by the exercise of extraordinary vigilance, aided by the highest skill; and this caution and vigilance must necessarily be extended to all the agencies and means employed by the carrier in the transportation of the passenger.
9. **Carriers—Passengers—Burden of Proof.**—When the passenger has proved his injury as the result of a breakage in the car or the wrecking of the train on which he was being carried, the burden is then cast upon the carrier to show that the accident was due to a cause or causes which the exercise of the utmost skill and foresight could not prevent.
10. **Verdict—When Verdict for \$10,000 Not Excessive.**—Where a passenger was injured in a railroad accident to such an extent that he was broken in health; permanently injured in his lungs; his nervous system broken down; his eyesight affected; his speech materially changed; the upper and middle lobes of his lung con-

solidated, which may lead to tuberculosis; his heart and bowels affected, a verdict of \$10,000.00 is not excessive, although no bones of the passenger were broken.

11. **Argument of Counsel.**—Statements made by appellee's counsel in argument are not grounds for a reversal, unless they were prejudicial to the appellant.

**BENJAMIN D. WARFIELD** and **BLACK, BLACK & OWENS** for appellant\*

**J. M. ROBSION** for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—Affirming.**

On April 9, 1913, the appellant furnished Mitchell, the appellee, a box car in which to remove his household effects and personal property from Barbourville, in Knox county, to Point Levell, in Garrard county. Mitchell paid \$38.00 for the use of the car, and was required to buy a passenger's ticket, although he rode in the car which was loaded with his household effects, farming implements, kitchen and dining-room furniture, some lumber, four pigs in a crate, and five head of cattle and a calf fenced off in one end of the car.

The car thus loaded was placed in the middle of an ordinary freight train and carried to Corbin, where it was put into a new train, consisting of forty-six loaded cars, Mitchell's car being placed next to the engine.

When the train reached Round Stone Creek, near Livingston, in Rockcastle county, from some unexplained reason Mitchell's car telescoped the tender, causing a bad wreck of Mitchell's car. The draw-head was pulled out of the car and Mitchell received severe internal injuries, although no bones were broken, and his property was badly damaged.

He brought this action in Knox county, and recovered a verdict and judgment of \$10,000.00 for personal injuries; \$350.00 for doctors' bills, medicines, nursing, &c.; and \$500.00 for damage to and loss of his property, making a total recovery of \$10,850.00. From that judgment the company prosecutes this appeal, and for a reversal relies upon the following grounds: (1) The Knox Circuit Court had no jurisdiction of the action; (2) no negligence upon the part of the appellant was shown; (3) the verdict was excessive; (4) misconduct of plaintiff's counsel upon the trial; and (5) error in the first three instructions.

1. The contract of shipment was made in Knox county; the accident occurred in Rockcastle county, while Mitchell was on his way to Garrard county. Appellant contends that Mitchell had left Knox county for the purpose of removing to and living in Garrard county.

Section 73 of the Code, which fixes the venue of actions against a common carrier, reads as follows:

“Excepting the actions mentioned in Section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county into which the carrier passes.”

Section 83, relating to joinder of actions, provides, in part, that “several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action.”

Appellant concedes that the Knox Circuit Court had jurisdiction to try the appellee's claim for injury to his property, because the contract to carry said property was made in Knox county. It insists, however, that the Knox Circuit Court had no jurisdiction over the other two claims, for personal injuries, and for doctor's bills, medicines, nursing, &c., because, under Section 73 of the Code *supra*, an action against a carrier for an injury to a passenger, or his property, must be brought in the county in which the defendant resides, or in which the plaintiff or his property is injured, or in which he resides, if he resides in a county into which the carrier passes. Mitchell and his property were injured in Rockcastle county; the appellant resides in Jefferson county, wherein its chief office is located; and it contends that Mitchell resided in Garrard county at the time he received the injuries to himself and his property.

Proceeding upon the theory that there was a misjoinder of causes of action, appellant attempted to raise that question by filing a speaking demurrer to the peti-

tion. This demurrer interposed an objection to the jurisdiction of the court to take cognizance of and try the three causes of action set up in the petition, and alleged that Mitchell was not a resident of Knox county at the time the injuries were inflicted, or when the petition was filed, but that he was a resident of Garrard county, through which the appellant then and at all times since operated a railroad, its chief office being in Jefferson county.

The special demurrer was properly overruled, for two reasons: First, because a demurrer cannot enlarge the allegations of a petition by reciting extraneous facts. Section 92 of the Civil Code of Practice says: "A special demurrer is an objection to a pleading which *shows* that the court has no jurisdiction of the defendant, or of the subject matter of the action." The petition does not show the facts relied upon to defeat the jurisdiction, and those facts cannot be shown by reciting them in the demurrer, as was here attempted. In the second place, the Knox Circuit Court clearly had jurisdiction of the claim for injury to Mitchell's property; and, since the special demurrer was to the jurisdiction generally, it was properly overruled because the Knox Circuit Court had jurisdiction over one of the causes of action stated.

Appellant could have raised the question of misjoinder of actions by making a motion under Section 85 of the Civil Code of Practice, to require the appellee to elect which of the actions he would prosecute. *Metcalf v. Johnson*, 151 Ky., 826. But this it failed to do.

Appellant did, however, subsequently raise the question of the jurisdiction of the court, in its answer, by alleging that Mitchell was a resident of Garrard county at the time of the accident; and upon that allegation issue was joined and evidence taken. The only evidence, however, upon the question of residence was that of Mitchell. He testified that he had kept house in Barbourville for several years; that in February, 1912, he had bought a farm in Garrard county; and having difficulty in securing a satisfactory tenant, he resolved to go to the farm temporarily, in the spring of 1913, for the purpose of making some needed repairs and improvements upon the farm.

Mitchell was a traveling salesman for the Crescent Milling Company, and, expecting to continue his work

in the territory embracing Knox county, he had rented his Barbourville house for the summer, with the agreement that his tenant would surrender it in the fall. During his absence Mitchell reserved one room of his Barbourville house for storage purposes; and he further avowed that at the time of the accident and the trial he was City Clerk of Barbourville, the county seat of Knox county.

Appellant offered an instruction submitting to the jury the issue as to Mitchell's residence, but the circuit court refused to give it, upon the ground that the evidence upon that issue was all one way, and showed that Mitchell was a resident of Knox county at the time of the accident.

We are of opinion there was no error in this ruling. Mitchell testified, without contradiction, that his intended sojourn in Garrard county was to be temporary, and only for the purpose of caring for his farm in that county, and that his returning to Barbourville in the fall was arranged for with his tenant before he left Barbourville.

"Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation. It does not include as much as domicile, which requires an intention combined with residence. \* \* \*

"One may seek a place for purpose of pleasure, of business, or of health. If his intent be to remain it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence." Bouvier's Dict.

The only evidence upon this issue shows that Mitchell never intended to reside in Garrard county.

Applying this rule to the uncontradicted facts shown by Mitchell's testimony, he was a resident of Knox county, and the Knox Circuit Court had jurisdiction to try all the causes of action set forth in the petition.

2. Appellant insists that it can be liable only in case negligence is shown upon the part of its servants and employes, and that the proof in this case wholly fails to show negligence; and, further, that the petition rested the plaintiff's case upon a charge of negligence in furnishing him a car that was greatly out of repair, dangerous and unsafe, while the proof shows the accident is unexplained, or at least was not caused by a defective car.



Appellant, however, states the case too strongly in its own behalf, since there was proof that the car was old and rotten; that it had an old, worn, cracked and broken draw-head; and that the draw-head had been pulled from the broken and rotten timbers of the car.

Unquestionably the rule is, that, under a general allegation of negligence, any negligence may be shown; but where specific acts of negligence are relied upon, they must be proved as alleged, in order to sustain a recovery. But here there was evidence to sustain the negligence specifically charged.

Appellant insists that the accident occurred by the breaking of the air hose which automatically set the brakes on the engine, and that the momentum of the heavy train caused by its movement, caused the slack in the train to be taken up, and Mitchell's car to be thrown against the engine in the way above described. Appellant would explain the breaking of the hose by suggesting that it was cut by a tramp riding on the train. There is no evidence, however, even tending to support the suggestion.

Appellee explains the accident by saying that the weight of the train pulled the draw-head out of the rotten sill, and the draw-head also broke; that this caused the train to part, and the hose or air-line was thereby broken and the brakes automatically applied to the engine, whereupon the train ran against the engine and tore up the car, as above indicated.

It is sufficient in this connection to say that there was evidence upon both sides of the charge that the car was defective; and that being true, the decision of that question was for the jury.

A common carrier of passengers is bound to provide for their safety, so far as human care, skill and foresight are capable of securing that end. *Morgan v. C. & O. Ry. Co.*, 127 Ky., 435, 15 L. R. A. (N. S.), 790, 16 Ann. Cas., 608; *C. & O. Ry. Co. v. Burke*, 147 Ky., 694, Ann. Cas. 1913 D., 208; 4 R. C. L., p. 1144.

As was said by Mr. Justice Harlan, in *Pennsylvania Railway Co. v. Roy*, 102 U. S., 451:

"He (the carrier) is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigi-

lance must necessarily be extended to all the agencies and means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars and vehicles adequate; that is, sufficiently secure as to strength and other requisites for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages."

This rule as to the full duty of the carrier to the passenger is supported by the decisions of this court in *Kentucky Central R. R. Co. v. Thomas*, 79 Ky., 160, 42 Am. Rep., 208; *Davis v. Paducah Light & Ry. Co.*, 113 Ky., 267, and cases *supra*.

And, the injury having been shown, the burden is upon the carrier to show that it could not have prevented it by the exercise of the utmost skill and foresight.

In *Morgan v. C. & O. Ry. Co.*, *supra*, the rule was stated as follows:

"When the passenger has proved his injury as the result of a breakage in the car or the wrecking of the train on which he was being carried, whether the defect was in the particular car in which he was riding or not, the burden is then cast upon the carrier to show that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent. And the carrier in this connection must show, if the accident was due to a latent defect in the material or construction of the car, that not only could it not have discovered the defect by the exercise of such care, but that the builders could not by the exercise of the same care have discovered the defect or foreseen the result."

The petition having charged that the car furnished Mitchell was defective, and sustained that charge by proof, there was a case for the jury, and appellant's motion for a peremptory instruction was properly overruled.

3. Was the verdict excessive? This ground relates principally, if not entirely, to the recovery of \$10,000.00 for personal injuries; the size of the two smaller recoveries is not seriously questioned.

Mitchell was 37 years of age, and had been earning about \$1,500.00 net annually for several years. And, al-

though no bones were broken, he was knocked unconscious, and was confined to the house for about six weeks. His principal injury was caused by a blow upon the chest and bowels, which injured him internally, causing him to expectorate blood from his lungs. According to Mitchell's testimony, he is broken in health; permanently injured in the lungs; his nervous system is broken down; his eyesight affected; his speech is materially changed; all of said injuries having resulted from the injury to his back, hip, legs, bowels and lungs. He has been unable to do any work since the accident; and, according to Dr. Jones, who examined him about six weeks after the accident, and shortly before the trial, the air did not go into the upper lobe or middle lobe of the left lung, thereby causing a consolidation of that organ, which may lead to tuberculosis. Dr. Jones further testified that he treated Mitchell for his bowels, lungs and heart; that his heart was very weak at times; that his bowels were "dead;" and his left hand was cold and clammy, indicating tuberculosis. Before the accident Mitchell weighed from 176 to 180 pounds; at the time of the trial he weighed about 140 pounds. Although no bones were broken, this proof tends strongly to support Mitchell's claim that his injuries are serious and permanent.

There was some medical proof introduced by the appellant to the effect that Mitchell's injuries were more feigned than serious, but that was a question for the jury to pass upon. If Mitchell's injuries were as bad as they were outlined by him and Dr. Jones, and the jury had a right to believe them, we are not prepared to say that the verdict is palpably against the weight of the evidence. *L. & N. R. Co. v. Mitchell*, 87 Ky., 327.

4. The misconduct of counsel for appellee consisted in his making the following statements in his argument to the jury, which were objected to by counsel for appellant:

"1. If the jury waits till one of your fellows come in here and admit that anything wrong happened, we'd all be in the grave. (Defendant objects.) Well, that's the fact.

"2. Yes, you get on one of these trains and go anywhere and there's a wreck and the employes come in here and they are looking everywhere, they look at the brakes, the hand-holds, the wheels and everything.

"3. The railroad is in fault or Mathew Mitchell is in fault; a thing like this cannot happen without one or the other is in fault. Now where's Mathew Mitchell in fault?

"4. You can ridicule Mathew Mitchell, but it's my honest judgment, gentlemen, that you'll not see Mathew Mitchell above the dirt twelve months from today. (Objection.) That's my honest judgment, gentlemen, from the evidence of Dr. Doxier and Dr. Jones.

"A. What, would you go through with the pain and suffering he has endured and what pain and suffering he will endure?

"B. If he goes to his grave by the result of this injury this verdict is the end of it; if he lives throughout his life to endure this pain and suffering this verdict is the end of it. Bring a verdict that means something."

While some of these statements were not, strictly speaking, entirely relevant to the questions at issue, they were not prejudicial.

5. Aside from the contention that there should have been a peremptory instruction for the reasons above stated, no serious or substantial objections are made to the instructions given. In their brief counsel for appellant make some minor objections of the first three instructions, but they are more critical than substantial. In requiring appellant to exercise only ordinary care in inspecting its cars, the instructions were more favorable to appellant than the authorities above cited warranted.

Judgment affirmed.

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### **Equitable Life Assurance Society v. O'Connor's Administrator.**

(Decided January 21, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Number Four).

1. Insurance—Insurable Interest—What Constitutes Interest in Human Life.—The relationship of uncle and nephew or niece is not of itself sufficient to constitute an insurable interest upon the part of either in the life of the other where there is no reasonable ground of expectation of support to be furnished by the assured to the other.

2. Insurance—Insurable Interest—Wagering Policies in General.—Where the assignment of a policy of insurance was contemplated at the time it was procured to be issued, the first and all subsequent premiums to be paid by the assignee, and he to receive the proceeds of the policy, and the assignee lacks insurable interest in the life of the insured, the assignment is void, barring recovery by the assignee from the insurer; and the policy itself is void, preventing a recovery by the personal representative of the insured, from the insurer. Such an arrangement is a mere colorable evasion of the prohibition against wagering contracts, violative of a sound public policy, and unenforceable in the courts.

HUMPHREY, MIDDLETON & HUMPHREY for appellant.

DAVID R. CASTLEMAN and PRYOR & CASTLEMAN for appellee.

OPINION OF THE COURT BY JUDGE HANNAH—Reversing.

In 1904 Mary O'Connor, at the solicitation of her uncle, John O'Connor, procured a policy of insurance on the life of John O'Connor to be issued by the Equitable Life Assurance Society. Her parents were dead; but she was not only self-supporting, but was also earning sufficient to make some provision for her future; and an investment in the form of a policy of life insurance upon her uncle's life was recommended to and urged upon her by him, as a safe way of accumulating her surplus earnings.

It was arranged between them that she was to pay the first and all succeeding premiums on the policy and was to have the entire proceeds thereof at O'Connor's death. The policy was issued payable to the estate of the insured, and a few days thereafter he assigned it to Mary O'Connor. She continued to pay the premiums thereon until 1912, when O'Connor died.

Upon his death she made proof of claim and applied to the assurance society for payment of the policy. The society paid to her \$497.15, the total of the premiums she had paid, but declined to pay the face of the policy upon the ground that she had no insurable interest in the life of her uncle, and that the policy was, therefore, void.

John O'Connor's administrator brought this action in the Jefferson Circuit Court against the assurance society to recover the amount of the policy, upon the theory that the policy itself was valid, but that the assignment

thereof to Mary O'Connor was invalid. There was a verdict and judgment in favor of plaintiff in the sum of \$502.85, being the amount of the policy, one thousand dollars, less \$497.15, the total of the premiums paid by Mary O'Connor and restored to her by the insurer. The defendant appeals.

1. The relationship of uncle and nephew or uncle and niece is not in itself sufficient to constitute an insurable interest upon the part of either in the life of the other, where there is no reasonable ground of expectation of support to be furnished by the assured to the other. *Hess' Admr. v. Segenfelter*, 127 Ky., 348, 105 S. W., 476, 32 R., 225, 128 A. S. R., 343, 14 L. R. A. (n. s.), 1172; *Woods v. Woods*, 130 Ky., 162, 113 S. W., 79, 19 L. R. A. (n. s.), 233; *Metropolitan Ins. Co. v. Elison*, 72 Kan., 199, 115 A. S. R., 189, 7 Ann Cas. 909, 3 L. R. A. (n. s.), 934. Mary O'Connor, therefore, had no insurable interest in the life of her uncle, John O'Connor.

2. It is also well settled that where the assignment of the policy was contemplated at the time it was procured to be issued, the first and all subsequent premiums to be paid by the assignee, and he to receive the entire proceeds of the policy, the assignment is void as between the insurer and the assignee, where the latter lacks insurable interest in the life of the insured. *Steinback v. Diepenbrock*, 158 N. Y., 24, 44 L. R. A., 417, 70 A. S. R., 424, 52 N. E., 662; *Powell v. Dewey*, 123 N. C., 103, 68 A. S. R., 818; *Keystone v. Morris*, 115 Pa., 46, 2 A. S. R., 572; *Brookway v. Mutual Life*, 9 Fed., 249; *Hinton v. Mutual Reserve*, 135 N. C., 314, 65 L. R. A., 161, 102 A. S. R., 545; *Metropolitan Ins. Co. v. Elison*, *supra*.

3. But this contest is between the personal representative of the insured and the insurer, and not between the assignee and the insurer.

The authorities are in conflict as to whether the policy itself is invalid, so as to prevent a recovery thereon by the personal representative of the insured, where the assignment of the insurance contract was contemplated at the time it was procured to be issued, and where the assignee, having no insurable interest, is to pay the first and all subsequent premiums and to receive the proceeds of the policy.

But this court has adopted the rule that in such case the policy, although in form originally issued to the in-

sured, having been in fact procured for the benefit of one having no insurable interest, is therefore invalid from its inception; such assignment of the policy being a mere colorable evasion of the prohibition against wagering contracts.

The rule that in such case the policy itself is invalid was announced by this court in *Bromley's Admr. v. Washington Life Insurance Company*, 122 Ky., 402, 92 S. W., 17, 121 A. S. R., 467, 12 Ann Cas. 685, 5 L. R. A. (n. s.), 747.

In that case, Bromley made an arrangement with one Bates whereby the latter was to pay the former \$75.00 and they were to obtain insurance policies on Bromley's life, payable to his estate, which policies Bromley was to assign to Bates, he to pay the first and all subsequent premiums, and to have the proceeds of the policies; Bates having no insurable interest in Bromley's life.

The court in that case quoted from *Steinback v. Diepenbrock*, *supra*, the following language: "The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together as forming part of one transaction."

The court then said that if the policies in question had been made payable directly to Bates they would have been void, because he had no insurable interest in Bromley's life; and the issual of the policies payable to Bromley and assignment by him to Bates being a mere evasion of the prohibition against wagering contracts, could not operate to validate that which was invalid.

In the Bromley case the court said:

"It is conceded that if the policies under this arrangement had been made payable to Bates, they would have been void, as he had no insurable interest in the life of Bromley. But it is insisted that as they were made payable to Bromley's estate and were assigned by him to Bates, only the assignment is void and that his administrator should recover from the insurance company. There would be force in this if the policies had been delivered to Bromley and the assignment to Bates had been a subsequent and independent transaction. But the proof leaves no doubt that Bromley did not contemplate insuring his life for the benefit of his

estate at any time. He contemplated simply getting \$75.00 out of the arrangement."

There is some proof in this record that O'Connor had the policy in his own possession for a short time before it was assigned to Mary, his niece; and appellee administrator lays great stress upon this, contending that this case is thereby taken out of the rule announced in the Bromley case. The evidence of Mary O'Connor and the agent who delivered the policy is that the policy was delivered to Mary by the agent when she paid the first premium, and this evidence is uncontradicted. But the matter of delivery of the policy is immaterial. The material thing was that O'Connor, like Bromley, never had any purpose to insure his life for the benefit of his estate; and the assignment of the policy by him to his niece was not an independent transaction originating and executed after the insured had taken out a policy on his life, payable to his estate, in good faith, for the benefit of his estate. That assignment was made by him pursuant to the arrangement contemplated at the time the policy was procured to be issued, and constituted an evasion of the prohibition against the taking of insurance by persons having no insurable interest in the life of the insured.

Such transactions are obnoxious to the law, and violative of a sound public policy; invalid in their inception, and unenforceable in the courts. *Metropolitan Ins. Co. v. Elison, supra*. O'Connor's administrator, therefore, was not entitled to recover any amount upon the policy in question.

Judgment reversed.

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### Hatchett v. Blacketer.

(Decided January 21, 1915.)

#### Appeal from Washington Circuit Court.

1. Damages—Detaining Female Against Her Will.—The attempted crime of fornication and adultery when accompanied with taking and detaining the female against her will is a complete offense under the statute, and being so it is actionable at common law, and by Section 466 Kentucky Statutes.
2. Damages—Detaining Female Against Her Will—What Constitutes Such Detention.—The laying of hands upon a woman and squeezing her breasts was such taking and detaining as contemplated by statute.



3. **Damages.**—An unaccomplished purpose can only be determined by surrounding circumstances.

W. F. GRIGSBY and J. W. S. CLEMENTS for appellant.

W. C. McCHORD and WM. F. NEIKIRK for appellee.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

This action was by the appellee to recover \$10,000 damages for mental anguish and physical pain suffered as the result of an alleged unlawful and felonious assault and battery, committed by the appellant in taking and detaining her against her will with intent to have carnal knowledge of her. In addition to the direct charge of assault and battery, the petition sets forth all the facts which Section 1158 of the Kentucky Statutes declares are sufficient to constitute the offense of "unlawfully taking and detaining a woman against her will." The appellee recovered a verdict and judgment for \$500.

Appellant first insists that facts denounced by that statute are not actionable—that they amount to nothing more than an attempt to commit a crime. Yet, it is a fact that the attempted crime of fornication or adultery, when accompanied with taking and detaining a female against her will, is a complete offense under the statute. It being an offense against the statute, it is actionable at common law. *City of Henderson v. Clayton*, 57 S. W., 1; *Sutton v. Wood*, 120 Ky., 30; *Clayton v. Henderson*, 103 Ky., 228; *Smith v. National Coal Co.*, 135 Ky., 671.

But, aside from the common law, a violation of a statute is rendered actionable by Section 466 of the Kentucky Statutes, which is as follows:

"A person injured by violation of a statute may recover from the offender such damages as may be sustained by reason of the violation, although a penalty or forfeiture be imposed by the statute."

In addition to showing facts constituting a violation of the statute, the petition, as above stated, alleges an assault and battery. If there was misjoinder, and we do not mean to so hold, the appellant made no motion to elect, and did not demur to the petition; in fact, he took no steps in the lower court to avail himself of the errors he now complains of.

The next argument of appellant is in the nature of a demurrer to the evidence.

The appellee testifies that appellant came to her house one morning in her husband's absence, and suggested to her that she married too young; "there are lots of them don't marry for love, you know what they marry for." After an interval he asked to see her baby's picture. "Well," he says, "it don't favor either of you; his chin and forehead that is all, and the mouth part is like you, and that is the pretty part, and he laid his hand on my face and it fell right down on my shoulder and breast and he squeezed my breast, and then I ran from him and told him to get out—I knocked his hand off that way—I pushed him away—I stood at the table; I didn't know what to do, it scared me so bad that I didn't know what to do." She then tells of how he begged her not to tell her husband about it, and then left, and how she cried, and of appellant's return two or three times that morning with such trifling excuses for the return as wanting to get her mail, etc., but really to beg her not to tell her husband. The husband returned at noon and she immediately made the facts known to him. They went to the home of her father-in-law that evening, where the information was again given, and six days afterwards this suit was filed.

The appellant admits going into the house and returning once that morning, but he denies any such conversation, or laying of hands on her, or squeezing her breast, and says there was nothing said about telling her husband.

The testimony of appellee is sufficient to sustain an action for assault and battery. *Ragsdale v. Ezell*, 49 S. W., 775 (not reported); *McGee v. Vanover*, 148 Ky., 737.

Moreover, the laying of hands upon the woman and squeezing her breast was a taking and detaining of her against her will. *Evans v. Commonwealth*, 79 Ky., 415; *Malone v. Commonwealth*, 91 Ky., 307; *Paynter v. Commonwealth*, 55 S. W., 687 (not reported); *Jones v. Commonwealth*, 121 Ky., 266; *McKay v. Commonwealth*, 145 Ky., 451.

But appellant insists that he was entitled to a peremptory instruction, because her proof did not show that his purpose was to have carnal knowledge of her. Proposals indicating this purpose may be made by indirection and the look and manner accompanying it are

as expressive as the words. The appellee testifies that soon after he came in "he tried to see how bad he could talk to me," and there can be no doubt of her belief as to his unlawful purpose. His subsequent conduct, and other suggestive remarks about the mail on his return visits that morning, are circumstances which the jury were entitled to consider in determining his purpose. An unaccomplished purpose can only be ascertained by the surrounding circumstances. We are of the opinion that the court properly refused the peremptory instruction.

Appellant argues that the acts complained of were nothing more than a harmless caressing, and that this court ought not to permit such an incident to be converted into a serious statutory offense. In the first place, that question—the purpose—was for the jury. They heard the witnesses and it was their province to say whether, under the evidence, his purpose was unlawful. No doubt, the jury would have given more consideration to this argument if the appellant had given testimony in support of it, but he denies there was a caress of any sort; says he did not touch her nor use an improper word of any sort to her. It is a simple question of veracity between the man and woman. If her story is true, then we believe the jury made no mistake as to his purpose. Under the evidence, we feel that we are not authorized to disturb the verdict.

The judgment is affirmed.

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### Burris, et al. v. Stepp.

(Decided January 21, 1915.)

Appeal from Pike Circuit Court.

1. Contracts—Sale of Standing Trees—Statute of Frauds.—Under Sub-section 13, Section 1409, Kentucky Statutes, no contract for the sale of standing trees shall be enforceable unless the same or some memorandum thereof is in writing, signed by the parties.
2. Contracts—Sale of Standing Trees—Brands.—Sub-section 14 of the same Section does not limit application of Sub-section 13. Under this Section, when the written contract is executory and the trees contracted are branded by the owner, or with his consent, then the sale has the same force as a recorded sale of land.

J. S. CLINE for appellants.

ROSCOE VANOVER for appellee.

## OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Appellants sued the appellee to recover damages for breach of contract. The contract was verbal, and by it appellants claim to have purchased of appellee a number of standing trees on a certain boundary of land described in the petition. They say that the trees were purchased in contemplation of immediate severance from the soil. The lower court sustained a demurrer to the petition and the question on this appeal is, whether a verbal contract of this character is enforceable

In *Byassee v. Rees*, 4 Met., 372, it was held that a sale of standing trees in contemplation of immediate separation from the soil is a constructive severance of them, and they pass as chattel, and, therefore, the contract of sale is not within the Statute of Frauds. Appellants insist that this is still the law in Kentucky, and to support the contention, they cite the following more recent cases, all of which adhere to the rule laid down in the *Byassee* case: *Pilford v. Dotson* (1899), 106 Ky., 755; *Wiggins v. Jackson* (1903), 24 Ky. L. R., 2189; *Strubbe v. Lewis* (1903), 25 Ky. L. R., 605; *Bell County Land Co. v. Moss* (1906), 30 Ky. L. R., 6; *King v. Cheatham* (1907), 31 Ky. L. R., 1176; *Bowerman Co. v. Taylor* (1908), 32 Ky. L. R., 671.

In sustaining the demurrer, the lower court applied Sub-section 13, of Section 1409, of the Kentucky Statutes. This sub-section is an act of the 23rd day of March, 1900, and is as follows:

"No contract for the sale of standing trees or standing timber shall be enforceable by action unless the said contract or some memorandum thereof be in writing, signed by the person to be charged or his duly authorized agent."

This sub-section in express terms nullifies verbal contracts for any sale of standing trees. It makes no difference how soon they are to be severed from the soil. But appellants say Sub-section 13 is modified by Sub-section 14, which is also a part of the same act of March 23rd, 1900, and it is as follows:

"Whenever any timber shall be branded by the seller, or by another with his consent, with the brand of the purchaser, or other person or corporation, then the title to said timber shall at once pass to the person or corporation whose brand is thus placed upon it, but this shall not affect the rights of the contracting parties

with respect to the payment of the purchase money thereof."

The petition alleged that 161 of the trees were branded, and, by reason of that fact, appellants insist that the title passed, although the contract was verbal. But it seems to us that Sub-section 14 does not limit or modify the effect of Sub-section 13, or rather was not intended as an added means of passing title. As a rule, contracts for the sale of standing timber are executory, and most frequently provide for the sale of certain trees of a particular kind and definite specifications. Sub-section 13 does not require that writings evidencing such contracts shall be acknowledged or proven, or possess the other attributes of recordable instruments, neither are they entitled to record under the provisions of Section 494 of the Kentucky Statutes with reference to mineral and oil leases.

In view of the ruling of the Byassee case and the other cases cited, that standing trees sold in contemplation of immediate severance from the soil are chattels, and since they are not susceptible of manual delivery, it was, no doubt, the purpose of the legislature by Sub-section 14 to provide a means of identification that would take the place of recording, and serve as notice of such sales, so that creditors and innocent purchasers might be protected. Title, in fact, passed by the written contract as between the parties to it, but third persons without notice, such as creditors and subsequent purchasers, are no more affected by it than by any other unrecorded sale of land. However, when the trees are branded and identified, as provided in Sub-section 14, they are affected in the same way as if the instrument were entitled to be, and had been, recorded.

The two sections taken together mean that all contracts for the sale of standing timber shall be in writing, and that whenever the particular timber contracted is branded by the seller, or by some other person with his consent, then the sale has the same force as to creditors and innocent purchasers as a recorded sale of land.

Appellants urge, with great force, that this application of Sub-section 13 is in conflict with the rule in the Byassee case, and which has been uniformly adhered to by this court, as evidenced by the cases above cited. But, from a careful examination of these opinions, it appears that all of them, except two, were based upon contracts entered into before the act of 1900 was passed.

In the King and Wiggins cases, *supra*, the opinions do not show the date of the contracts, but we have examined the records, and find in the King case the contract was made in 1895, and in the Wiggins case the contract was made in June, 1900, which was before the act of 1900 was effective. It contained no emergency clause, and, therefore, did not become a law until 90 days after March 23rd of that year.

The judgment of the lower court is, therefore, affirmed.

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### **Caldwell & Drake v. Cunningham.**

(Decided January 21, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Second Division).

1. Sales—Of Personal Property—Rights and Remedies of Purchaser after Delivery in Case of Disagreement as to Contract.—When no definite contract has been made for the sale of personal property and there is disagreement between the seller and the buyer as to the terms of the contract pending which the property is delivered, the buyer has the right to reject it or to accept and use it as he intended, but if he adopts this latter course with knowledge of the difference between himself and the seller as to the price, he must pay the price charged and cannot defeat the claim of the seller by insisting that he bought the property on different terms or at a different price.
2. Sales—Rights of Purchaser After Delivery When There is a Difference as to Contract Price—Case Stated.—“C” negotiated with “C” and “D” for the sale of lumber, but no definite contract as to the price was agreed on, “C” understanding that he sold at one price and “C” and “D” understanding that they purchased at another price. While this condition existed, “C” shipped the lumber to “C” and “D” with an invoice stating the price as he understood it. “C” and “D” objected to the price but used the lumber. When “C” and “D,” under these circumstances, accepted and used the lumber, their use was an acceptance of the price charged by “C.” It was the making of a new contract between the parties.

EUGENE R. ATTKISSON for appellants.

A. E. WALSH and KINNEY & THOMAS for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellee, Cunningham, was a dealer in lumber, and the appellants, Caldwell & Drake, were contractors and builders. Desiring to purchase some oak flooring for a courthouse they were building, Caldwell & Drake entered into negotiations with Cunningham to furnish the flooring. Following some preliminary talk concerning the quality and price of the flooring, and on May 27, 1911, Cunningham wrote Caldwell & Drake a letter in which he said he could furnish clear oak flooring at \$99 per thousand feet and select flooring at \$69 per thousand feet, and that the flooring would run about 20% select and the remainder clear.

After this, on June 23, 1911, Cunningham sent to Caldwell & Drake, from Louisville, Ky., to Lebanon, Indiana, where the flooring was to be used, samples, and in this letter said that the samples contained 80% of the clear grade and 20% of the select, and this would represent the flooring that he would send. On June 28th Caldwell & Drake wrote that they would accept the flooring according to the samples submitted, and thereupon Cunningham shipped them a carload of the flooring. At the same time he sent them a bill or invoice of the shipment, which stated on its face that the price for the clear flooring was \$99 and the select \$69.

A few days after this Caldwell & Drake wrote Cunningham that they were very much surprised at the charge for part of the flooring being \$99, as, according to their understanding, it was all to be furnished at \$69. In answer to this Cunningham replied that he did not see how there could be any misunderstanding about the price of the flooring, as his letters and invoice showed the cost. After this, and on August 15th, another carload of flooring was shipped, accompanied by an invoice showing the quantity and description and that the price was \$99 for clear and \$69 for select.

Caldwell testified that in the preliminary negotiations with Cunningham it was distinctly understood that they could not pay more than \$69 for flooring, and the contract was closed on this basis. He admitted, however, that both carloads of the flooring were used by his firm after they had received the bill and invoice for each carload, which showed that the price of the clear was \$99 and the select \$69.

Caldwell & Drake having refused to pay more than \$69 for the flooring, this suit was brought by Cunning-

ham to recover the difference between \$69 and \$99 for the clear flooring.

After an answer had been filed setting up the defense as we have indicated, the case went to trial before a jury, and when all the evidence had been heard the trial judge directed a verdict for Cunningham, and this appeal is prosecuted by Caldwell & Drake questioning the correctness of this ruling on the ground that as there was an issue of fact as to the contract price of the flooring, this issue should have been submitted to the jury.

An issue was made by the evidence of Cunningham, upon the one hand, and Caldwell, upon the other, as to whether the price of the flooring was as claimed by Cunningham or as claimed by Caldwell & Drake, and it is evident, from the testimony, that Cunningham believed that they were to pay \$99 for the clear and \$69 for the select, and that Caldwell & Drake believed they were getting all of it at \$69. There being this misunderstanding between the parties as to the terms of the contract before the flooring was shipped, the question for decision is, did the acceptance and use of the flooring by Caldwell & Drake after they knew from the invoice and bills the price charged for it by Cunningham, conclusively bind them to pay the price he charged?

If we should assume that Caldwell & Drake fairly understood that the price of the flooring was \$69, the letters that passed between the parties after the bill and invoice for the first car of flooring had been received and before it had been used, put it beyond dispute that Caldwell & Drake knew that Cunningham's price was \$99 for the clear and \$69 for the select. With this knowledge before them at a time when none of the flooring had been used, we think that Caldwell & Drake, if they did not desire to pay the price charged by Cunningham, should have declined to use the flooring until the difference between them was adjusted in some satisfactory way; but that, having used it, they must pay the price charged.

The question presented in this case is not by any means a new one, and we think the authorities are quite uniform in holding that, under circumstances such as are shown in this case, Caldwell & Drake could not use the flooring and then refuse to pay the price for which Cunningham claimed he sold it.



In *Kerr v. Smith*, 5 B. Mon., 552, Smith sold the Kerrs a lot of tobacco. The Kerrs accepted the tobacco, but, insisting that the quality was not what it was represented to be by Smith, refused to pay the contract price. In holding that the Kerrs had no right to accept the tobacco and fix a price upon it lower than the price fixed by the terms of the contract, the court said:

“Having received the tobacco, though it may have been of inferior quality to that required by the contract, they have no right afterwards to raise objections or refuse to pay for the same, according to the stipulations of their contract. They should have refused to receive it, if it did not come up to the contract, or if they had permitted the first two loads to be taken from the wagon and placed under shelter in their factory, they should have laid it aside and immediately notified Smith that they would not receive it under the contract, and that he need send no more; in which event Smith would have been left at liberty either to dispose of the tobacco elsewhere or to agree to deliver it under a new contract with the defendants, or to tender it under his existing contract, as coming up to its terms and quality, and demanding from them the receipt of it as such, and in case of their refusal to remove it, reserving his right to make them responsible for a breach of their contract.”

This case differs from the one at bar in the respect that in this case it appears there was a contract between Smith and the Kerrs as to the price and quality of the tobacco, and the tobacco did not correspond in quality with the terms of the contract of purchase. But the principle announced by the court is that the buyer, if goods do not come up to the contract or his understanding of the contract, must either reject them or, if he accepts them, pay the seller's price. To the same effect are *Duff & Oney v. Rose*, 149 Ky., 482; *Jones Brothers v. McEwan*, 91 Ky., 373; *Vogel v. Moore*, 27 Ky. L. R., 94.

In *Estey Organ Co. v. Lehman*, 132 Wis., 144, 11 L. R. A. (n. s.), 254, the controversy arose about the price of an organ purchased by Lehman. As stated in the opinion, it was established by the evidence that Lehman believed he was to pay for the organ \$1,750, while the organ company supposed it was to get \$2,300 for it and understood it was selling it for that price. It was, therefore, apparent that the minds of the parties never

met upon the price before delivery of the organ. When the organ was shipped the organ company sent to Lehman an invoice showing the price to be \$2,300. Upon receipt of this invoice Lehman wrote stating there was a mistake as to the price, but, notwithstanding this, he retained the possession of the organ; and, in holding that he must pay the price at which the organ company understood it was sold, the court said:

"The defendants having received and retained the property with knowledge of the price plaintiff expected to receive, and without any agreement, express or implied, for a different price, they cannot escape payment of the price stated in the invoice. \* \* \* The minds of the parties not having met upon the price prior to the time the property was received by defendants at Houghton, Michigan, it was their duty, when they received it with knowledge of the price, to refuse to accept it, unless they were willing to pay the price stated in the invoice. Having taken the property and converted it to their own use, they became liable to pay such price, which the evidence establishes was the regular selling price, and a reasonable price." To the same effect is *Cunningham Manufacturing Co. v. The Rotograph Co.*, 30 App. D. C., 524, 15 L. R. A. (n. s.), 368.

When there is disagreement and misunderstanding, as in the case before us, between the seller and the buyer as to the terms of the contract, and the property is delivered before this is settled, the buyer has the election to reject or to accept and use it as he intended, but, if he adopts this latter course, with knowledge of the difference between himself and the seller as to the price, he must pay the price charged, and cannot defeat the claim of the seller by insisting that he bought the property on different terms or at a different price. He has made his election and is bound by it.

If Cunningham and Caldwell & Drake had entered into a contract as to the price at which the flooring was to be furnished, and the terms were understood and agreed to by both parties, we do not think that Caldwell & Drake would be obliged, as a matter of law, to pay a higher price than the contract price merely because they used the flooring after receiving the invoice accompanying the flooring which showed that Cunningham was charging a higher price than the contract price; nor do we hold that, under such a contract, it would be proper for the court to take the case from the jury.

But this is not the case we have. It is clear, from the evidence, that the parties had not agreed on the price. The terms of the contract had not been closed when the flooring was shipped; but when Caldwell & Drake received the bill or invoice for the flooring and definitely understood from it the price charged by Cunningham, and, with knowledge of this price, accepted and used the flooring, their acceptance and use of the flooring was also an acceptance of the price charged by Cunningham. It was the making of a new contract between the parties. It was, in effect, the same as if Cunningham had written them that he would furnish the flooring for \$99 for clear and \$69 for select, and they had written him that they would accept his proposition.

Under the evidence, we think the court correctly ruled the case, and the judgment is affirmed.

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### **Fritts v. Swiss Cleaners & Dyers.**

(Decided January 21, 1915.)

#### **Appeal from Jefferson Circuit Court (Common Pleas Branch, Fourth Division).**

**Contracts—Contemplating Personal Supervision or Service of One Party—Rights of Parties.**—Where a contract provides, and it is the intention of the parties, that one of them shall render personal service or give personal supervision to the business created by the contract, the other party is entitled to this personal service or supervision and cannot be compelled to renew the contract when the other party has put it out of his power to give the attention or supervision contemplated by the contract, although the contract may in terms provide for its renewal after the expiration of a time fixed in the contract.

**BLAKEY, QUIN & LEWIS** for appellant.

**R. W. BINGHAM, EMANUEL LEVI** and **KOHN, BINGHAM, SLOSS & SPINDLE** for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

In February, 1908, and for some twelve years prior thereto, Mrs. Fritts, the appellant, had been engaged in the glove cleaning business in the city of Louisville and had established a wide reputation for skill and pro-

ficiency in this business, which she conducted under the trade name of the Louisville Glove Cleaning Company.

The appellee, Swiss Cleaners & Dyers, in February, 1908, were also engaged in the general business of cleaning and dyeing clothing of all sorts in the city of Louisville, and being desirous of engaging the services of Mrs. Fritts as a cleaner of gloves in connection with their business, on February 28, 1908, the following contract was entered into between Swiss Cleaners & Dyers, as party of the first part, and Mrs. Fritts, party of the second part:

“Witnesseth: That whereas the party of the first part is desirous of interesting the party of the second part in said first party’s business, and to have the said second party take charge of, control, and supervise so much of the first party’s business as may pertain or apply to the cleaning of gloves;

“Therefore, for and in consideration of the agreements hereinafter stated, second party agrees,

“First, To attend to and supervise the cleaning of all gloves offered to her for cleaning by first party.

“Second, To allow the first party a fee or commission of twenty per cent (20%) on the schedule of prices hereinafter named, which said fee or commission may be retained by first party on all collections made by it.

“Third, To be responsible for the loss, destruction or damage of or to any and all gloves entrusted to her for cleaning, so long only as same may be in her charge.

“And, in consideration of the foregoing agreements by the second party, and the additional consideration that the use of said second party’s name will be a most valuable asset to first party’s business, said first party agrees as follows: \* \* \*

“Nothing herein contained to prevent second party from carrying on and conducting all and any business second party may now have, or may hereafter secure or acquire.

“This contract to remain in full force and effect for the term of five years from date, with the privilege at the option of the second party of an extension of five years longer from the date of said five years’ limit or expiration, unless this contract be sooner annulled by both parties by mutual consent, with the further proviso, agreement and understanding that second party is privileged to declare this contract canceled at any time

upon giving first party at least thirty days' notice of her intention so to do."

Acting under the stipulation in the contract that it might be renewed, Mrs. Fritts, shortly prior to the expiration of the contract in February, 1913, requested its renewal for another term of five years, but the Swiss Cleaners & Dyers refused to renew the contract for the reason that at the time the demand was made Mrs. Fritts had removed to the State of California for the purpose of permanently there residing.

After this Mrs. Fritts brought this suit against the Swiss Cleaners & Dyers to recover damages for a breach of the contract growing out of the failure to renew it, and after the case had gone to trial before a jury, the trial judge, upon the conclusion of the evidence for Mrs. Fritts, directed a verdict in favor of the Swiss Cleaners & Dyers, and this appeal has been prosecuted to review the correctness of that ruling.

The trial judge was influenced to order a directed verdict by the fact that the contract contemplated that Mrs. Fritts would give her personal attention and supervision to the work, and this she had put it out of her power to do by removing to California.

We think the ruling of the trial court was correct.

We find in the brief for appellant this statement, which is fully supported by the evidence: "Mrs. Fritts for a number of years had been engaged in the business of cleaning kid gloves in the city of Louisville, and at the time the contract in question was made had attained the reputation of doing the best cleaning work in the city. The glove cleaning work of a large number of local stores and cleaning establishments was being done by her at the time appellee corporation was organized, and, as the contract itself shows, the new company desired to get the benefit of Mrs. Fritts' name in connection with its glove cleaning work."

It also appears from the contract that the chief consideration that induced the Swiss Cleaners & Dyers to enter into the contract was, as said in the contract, their desire "to have second party (Mrs. Fritts) take charge of, control and supervise so much of its business as may pertain or apply to the cleaning of gloves," because "the use of said second party's (Mrs. Fritts) name, will be a most valuable asset to first party's business;" and to emphasize the importance of this feature

in the contract, it was stipulated that Mrs. Fritts was "to attend to and supervise the cleaning of all gloves offered to her for cleaning by first party."

In view of all this, it is not open to doubt that one of the principal inducements to the making of the contract on the part of the Swiss Cleaners & Dyers was the consideration that the knowledge the public would soon acquire that Mrs. Fritts was giving her personal attention and supervision to the cleaning of gloves that might be sent to the Swiss concern would add greatly to the volume of their business, especially the glove cleaning feature of it. It was the name and reputation of Mrs. Fritts that the Swiss people wanted as much as her skill and proficiency in this class of work.

It is also, we think, a plain business proposition that when a person has obtained by individual merit a wide reputation in any particular line of business, and this personal reputation has been the means of building up a large trade in that line, the loss of the personal supervision and attention of such a person is bound to become known to the public sooner or later and consequently result in loss of business. If customers would send their gloves to the Swiss people to be cleaned because they believed that this class of work would be under the immediate supervision of Mrs. Fritts, we think it is also a fair inference that when the public discovered that Mrs. Fritts was not giving any attention to the business they would not be so desirous of having the Swiss Cleaners look after their gloves. But, however this may be, the Swiss concern contracted for the personal supervision of Mrs. Fritts and this service they were entitled to have.

The fact, too, that the Swiss Cleaners & Dyers had the right, under their contract, to solicit glove cleaning business with the assurance that the gloves would be cleaned under the supervision of Mrs. Fritts is entitled to weighty consideration, and when Mrs. Fritts moved out of the State and ceased to give any attention at all to this department, the Swiss concern was deprived of this valuable asset that it had the right to use in advertising its business. That the connection of Mrs. Fritts with the concern was a valuable asset is fully shown by the fact that the glove cleaning business of the Swiss Cleaners & Dyers increased each year during the five years Mrs. Fritts was connected with it. Indeed, during

the last year of the contract the business was more than twice as much as during the first year of the contract.

It is said, however, that before Mrs. Fritts' removal to California she did not give her continuous personal attention to the work, but that it was in charge of capable assistants who really conducted the business, and that these assistants would have continued to conduct it if the contract had been renewed.

This argument, however, does not impress us as affecting in any material way the right that the Swiss Cleaners had under the contract to demand the personal attention of Mrs. Fritts. It loses sight entirely of the value of her personal presence about the business and the knowledge that the public, and especially the large stores from whom a good deal of business was obtained, must have had of this fact. Mrs. Fritts may not have done any actual work. She may not have been about the place where the work was done every day; but, nevertheless, she was exercising a general personal supervision over it and was in a position to know that it was being done according to her ideas.

For example, her superintendent, Louis Devos, was asked and said: "Q. State whether or not Mrs. Fritts personally inspected the gloves sent to the plant for cleaning and that were cleaned and sent out? A. A great many times. Q. State whether or not Mrs. Fritts had anything to do in the actual work of cleaning gloves? A. She was in the cleaning room and seen it done and gave instructions. Q. While Mrs. Fritts was living here, did she come down to the plant every day? A. Nearly every day; yes, sir. Q. Would she stay there any length of time? A. Well, the time varied; sometimes she put in more time than others."

The law controlling the rights of parties to contracts that provide for or contemplate personal attention or service such as was provided for and contemplated by the parties to this contract is very well settled. In *Shultz & Co. v. Johnson's Admr.* 5 B. Mon., 496, Johnson and Shultz & Co. entered into a contract stipulating, among other things, that Johnson should furnish to Shultz & Co. "six successive crops of hemp of his own raising, embracing each year all the hemp he can raise upon not less than one hundred nor more than one hundred and sixty acres of land each year." Before the contract terminated Johnson died. After his death his

personal representative, with the consent of the heirs, undertook to grow on the land left by Johnson hemp to comply with the contract, and Shultz & Company refused to accept the hemp so grown upon the ground that the death of Johnson released them from any obligation under the contract. In holding that this contract not only contemplated but provided that the hemp furnished should be grown under the personal supervision of Johnson and consequently the obligation to receive the hemp terminated at his death, the court said:

“But, conceding, as contended by counsel, that Johnson could perform the contract, by renting the land and hiring the labor, still the expression, *of his own raising*, very clearly implies that his vocation and business was farming and raising hemp, and that the several crops which he stipulated to furnish were to be his own crops, raised by him or under his personal superintendence and direction. \* \* \* It is true, as insisted by counsel, that hemp is a coarse, raw material; but it is also true that it is an important and valuable staple, and we have a right to presume that its value greatly depends upon the attention, experience and skill in raising and preparing it for the use of the manufacturer. We think we have also a right to know that hemp known to be raised by one individual will often command a higher price and a more ready sale than hemp raised by another, although there might be very little seeming difference in the quality. \* \* \* It is sufficient that it was the intention of the parties that in the production and preparation of the hemp which Shultz & Company, under the contract, were bound to receive, the attention, skill and experience of Johnson were to be employed. As to the degree of skill and experience which he might possess, and its value, Shultz & Company were and had a right to be the sole judges. Much or little, they had a right to contend for and rely upon it. During the lifetime of Johnson he could substitute no person to perform this contract and obtain the benefit of it. \* \* \* We are of the opinion the parties intended the contract to be a *personal* one. As such the administrator was not bound to perform it, and, of course, not entitled to enforce it.”

The cases of *Marvel v. Phillips*, 162 Mass., 399, 26 L. R. A., 416; *Joan v. Williams*, 138 Ill., 43, 12 L. R. A., 496, furnish other illustrations of the prevailing rule



that a contract that contemplates personal service or supervision in business requiring skill and proficiency is not assignable and ceases to be enforceable when the party whose service or supervision is the subject of the contract cannot render it. Indeed, we do not think there is any conflict in the authorities upon this subject in cases in which it is shown that the character of the engagement and the intention of the parties to the contract was that one of them should render personal service or supervision.

If we should rule in this case that Mrs. Fritts was entitled to have a renewal of this contract for another term of five years, or damages for the failure to renew it, the inevitable effect of such a ruling would be to change material provisions of the contract and to say that the condition calling for the personal service and supervision of Mrs. Fritts did not mean anything. In truth, under the facts of this case, it would be making a new contract between the Swiss Cleaners & Dyers and Mrs. Fritts by which Mrs. Fritts would have the right to assign the contract or the right to turn her business over to others and cease to give it any personal attention or supervision. Manifestly this would be giving to the contract a construction not contemplated by the parties nor sustained by the terms of the contract.

There is some question as to evidence and perhaps other matters discussed in the briefs, but we need not notice them as the facts upon which we rest our decision determine the case and are not disputed.

Wherefore, the judgment is affirmed.

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### Stovall v. Mayhew.

(Decided January 21, 1915.)

#### Appeal from Allen Circuit Court.

**Land—Action to Recover—Evidence.**—Plaintiff sought to recover a tract of land, claiming title by virtue of a deed from one L. S. Clark and wife, conveying the land to plaintiff's mother, and at her death to plaintiff, the consideration being certain cash and promissory notes secured by a lien on the land. Defendant claimed title through L. S. Clark, who in turn claimed title by virtue of a commissioner's deed made pursuant to orders entered in an action alleged to have been brought by Clark against plain-

tiff's mother to recover the purchase money notes and enforce his lien against the land, in which action the land was sold and Clark became the purchaser. Held, under the evidence, that the records of the suit having been destroyed by fire, defendant failed to show that plaintiff was divested of title by the suit in question.

HARPER & GOAD and GILLIAM & GILLIAM for appellant.

GOAD & OLIVER for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Grover C. Stovall brought this action against defendant, Charles Mayhew, to recover a tract of land in Allen county. The defendant, by answer and counterclaim, denied plaintiff's title and pleaded and asserted title in himself, and asked that it be quieted. On final hearing the chancellor entered judgment dismissing plaintiff's petition and quieting the title of defendant. Plaintiff appeals.

Plaintiff claims title under and by virtue of a deed executed by L. S. Clark and wife on July 20, 1901, by which they conveyed the land in controversy to Malvinia P. Stovall for life, and at her death to plaintiff. The consideration expressed in the deed was \$175, of which \$55 was paid in cash and the remainder was represented by two notes for \$60 each, one payable April 15, 1892, and the other April 15, 1893. To secure the payment of these notes a lien was retained on the land. Plaintiff's mother died in the year 1912. Shortly thereafter this action was brought. At that time plaintiff was only 22 years of age.

Defendant claims title through L. S. Clark, who, in turn, claims title by virtue of a commissioner's deed dated September 25, 1896, made pursuant to a sale had under orders entered in the action of L. S. Clark, plaintiff, v. Mallie Stovall, defendant. It appears that the records of Allen county were destroyed by fire in the year 1902. The commissioner who made the sale is dead. L. S. Clark, the purchaser at the commissioner's sale, testifies that he sold the land in question to Mallie Stovall, and took the two notes for the deferred purchase money. The only credits which he remembers were two of \$15 each. The notes were never paid in full. He brought suit in the Allen Circuit Court for the purpose of collecting the notes and enforcing his lien. He re-

covered judgment and the land was sold. He became the purchaser for the amount of his judgment. According to his recollection, Oliver and Gilliam were the attorneys that brought the suit. While he did not sign a bond for Mallie Stovall, the suit referred to was not brought on the bond, but on the purchase money notes. Never delivered the notes to Mallie Stovall, or to anyone for her. She never at any time paid the notes. Could not account for plaintiff's possession of the notes, unless he or someone else abstracted the notes from the clerk's office. Denied stating to anyone that he had brought suit on the replevin bond, and that if one of Mallie Stovall's brothers, or anyone else, would pay the money he had paid out, together with the cost of the suit, he would have the deed made to him.

According to the evidence of plaintiff, he found the purchase money notes among his mother's papers at her death. Several other witnesses testified to having seen the notes in her possession, and to the fact that she was living in Tennessee at the time the suit was brought. Two or three witnesses stated that L. S. Clark told them that he was on Mrs. Stovall's bond, and had to bring suit to collect his money. J. W. Whitesides testified that he was present when Mallie Stovall paid the first of the two notes. He afterwards saw the second note in her possession. Before the suit was brought Mr. Clark told him that he had paid off the replevin bond for Mallie, and would have to sell the land to get his money back.

Since the court records were destroyed by fire, oral evidence was admissible to show the character and purpose of the suit and the parties thereto. On the one side, then, we have the statement of Mr. Clark that the purchase money notes were not paid, and that the suit in question was brought to enforce the purchase money lien, and that he became the purchaser when the land was sold. In addition to his evidence there is a commissioner's deed purporting to have been executed pursuant to the orders made in the suit. On the other hand, is the following evidence: Plaintiff's mother was out of the State when the suit was brought. One witness claims to have been present when the first note was paid. He and other witnesses afterwards saw both notes in her possession. They were found among her papers on her death. Though there were certain pin holes in the notes,

it does not appear that there was any mark on them indicating that they had been filed in any legal proceedings. Prior to the time of defendant's purchase Clark, who was on Mallie Stovall's bond, stated to two or three witnesses that he had to bring suit on the bond and sell the property in order to get his money. The only parties mentioned in the commissioner's deed are the plaintiff, Clark, and defendant, Mallie Stovall. The deed itself does not purport to have been made in an equitable action, but in "the action of L. S. Clark, plaintiff, v. Mallie Stovall, defendant." The deed does not purport to convey on behalf of plaintiff and Mallie Stovall, but on behalf of Mallie Stovall alone. It further appears that of the two attorneys who represented L. S. Clark in the suit in question one is attorney for plaintiff in this action, while the other is attorney for defendant. In view of the fact that the commissioner is dead, no one is in a better position to know the precise character of the suit in question than these gentlemen. Though the burden of proof was on the defendant to show the regularity of the judicial proceedings through which he claims title, he failed to introduce either of the attorneys as witnesses in this case. In view of this fact, and of numerous circumstances tending to show that the suit was not brought to enforce the collection of the lien notes, and of the further fact that there is an entire absence of evidence tending to show that plaintiff, who was then an infant, was a party to the suit in question, we conclude that the defendant utterly failed to show that plaintiff was ever divested of title by that suit.

Judgment reversed and cause remanded with directions to enter judgment in favor of plaintiff.

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### **Central Construction Company v. City of Lexington.**

(Decided January 22, 1915.)

#### **Appeal from Fayette Circuit Court.**

1. **Municipal Corporations—Ordinances—When Not Measures for Raising Revenue.**—Ordinances originating in the board of aldermen of a city of the second class, one ordering an election to determine whether an indebtedness should be incurred by the city and its bonds to that amount issued, for a necessary municipal improvement, naming the amount of such indebtedness and

the amount to be raised annually by taxation to pay interest on the bonds and creates a sinking fund to retire them at maturity; the other passed after the election, declaring the result, directing the issuance of the bonds and ordering the general council to thereafter levy and collect annually a tax sufficient to pay the interest on the bonds and create a sinking fund for their retirement, are not measures for raising revenue in the meaning of Section 3060, Kentucky Statutes. Consequently, it was not necessary that they first be introduced in and passed by the city's board of councilmen, as required by its provisions.

2. **Municipal Corporations—Ordinances for Raising Revenue—What Are.**—Ordinances of a city providing merely for the incurring of an indebtedness are not measures for raising revenue, as the indebtedness is to be paid in the future by the levy and collection of taxes to be thereafter fixed and imposed by subsequent ordinances. Bills or ordinances for raising revenue are confined to such as levy taxes in the strict sense of the word and do not embrace bills or ordinances for other purposes, which incidentally create revenue.
3. **Municipal Corporations—Publication of Ordinance as Notice for Election—What Publication of Notice Insufficient.**—Where a statute providing for the holding of an election to determine whether an indebtedness shall be incurred by a city of the second class, declares that it shall be done by publication, in the official newspaper of the city, of the ordinance calling the election and that "such ordinance shall be published for at least two weeks just preceding the election," its publication for only nine days just preceding the election will be fatal to the validity of the election. The requirement as to notice being mandatory, whether its language "at least two weeks just preceding the election" be construed to mean each of the two weeks, running from Sunday to Saturday, inclusive, next preceding the week in which the election is held, or fourteen days just preceding the election and including the day thereof, under neither computation was there a sufficient publication of the ordinance in this case.

R. J. COLBERT for appellant.

JAMES G. DENNY and J. EMBRY ALLEN for appellee.

**OPINION OF THE COURT BY JUDGE SETTLE—Reversing.**

In September, 1912, it was determined by the general council of Lexington, a city of the second class, to construct and install a sewage purification and disposal plant, also a storm water system, and complete what was known as the northern main sewer of the city, which had theretofore been partially constructed. As, according to the best estimates obtainable, the cost of the contemplated improvements would amount to \$200,000.00, which

could only be raised by the issuance and sale of the city's bonds, following an election determining that the indebtedness should be incurred, on September 12, 1912, there was duly passed by the board of aldermen of the city of Lexington and on October 1, 1912, by its board of councilmen an ordinance styled No. 3019, providing for the holding of such election, and on the following day, October 2, 1912, it received the approval of the mayor. The ordinance, in conformity to Section 3060, Kentucky Statutes, as amended by an act of the Legislature of 1910 (Acts 1910, page 296), provided for the submission to the qualified voters of the city of the question whether the indebtedness of \$200,000.00 should be incurred and bonds issued therefor, fixed November 5, 1912, as the day for holding the election, specified the indebtedness proposed to be incurred, the purposes of the same and the amount of money necessary to be raised annually by taxation for an interest and sinking fund.

Pursuant to the provisions of the ordinance, the election was held on the 5th day of November, 1912, at which there were 2,108 votes cast in favor of incurring the indebtedness and issuing the bonds, and 715 votes in opposition thereto. After the election commissioners had duly canvassed and certified the votes as cast, there was passed by the board of aldermen of the city of Lexington, on December 31, 1912, and on the same day passed by the board of councilmen, an ordinance known as No. 3092, which, on January 4, 1913, was approved by the mayor, and immediately thereafter duly published at length in the Lexington Herald. This ordinance, after reciting the result of the election, authorized and directed the mayor to issue and sell the bonds of the city of Lexington to the amount of \$200,000.00, maturing forty years after date, bearing 4% per annum interest, payable semi-annually, to provide funds for constructing the sewage purification and disposal plant and other work referred to. Section 4 of the ordinance provided for the levy by the general council of an annual tax on all of the real and personal property subject to taxation within the city, sufficient to pay the interest on the bonds as it became due and to create a sinking fund to pay the principal of the bonds at maturity.

On December 13, 1913, the appellant, Central Construction Company, entered into a written contract with the appellee, city of Lexington, whereby it undertook

and agreed to construct the uncompleted portion of the northern main sewer of the city at the price of \$35,000.00, to be paid in the bonds of the city issued pursuant to the ordinances, *supra*, which bonds appellant agreed to accept at their par value, with accrued interest. When appellant became entitled to the bonds under the contract referred to they were issued and tendered it by the appellee city, but it refused to accept them in payment for the work performed under its contract, upon the ground that they were invalid and by reason thereof could not be sold in any market. Following appellant's rejection of the bonds appellee brought this action in equity in the Fayette Circuit Court, praying that the court declare the bonds valid, and that the appellant be compelled to specifically perform its contract by accepting the bonds as therein provided.

The latter filed a general demurrer to the petition and also an answer interposing the defense: (1) That ordinance No. 3019, ordering an election to be held on November 5, 1912, for the purpose of submitting to the voters of the city of Lexington the question of incurring an indebtedness of \$200,000.00 and issuing bonds therefor, is invalid, because it was attempted to be enacted for the purpose of raising revenue, and did not originate in the board of councilmen of the appellee, as required by law. (2) That the ordinance No. 3019 was not published in the official newspaper of the city of Lexington for at least two weeks just preceding the election held on November 5, 1912, for which reason the election was void and of no effect. (3) That ordinance No. 3092, authorizing and directing the mayor to issue and sell the bonds of the city to the amount of \$200,000.00, is invalid, because it was attempted to be enacted for the purpose of raising revenue and did not originate in the board of councilmen of the city, as required by law.

The appellee filed a general demurrer to the answer, and thereafter the court overruled appellant's demurrer to the petition, but sustained appellee's demurrer to the answer, and upon the failure of appellee to plead further, rendered judgment declaring the bonds valid and compelling appellant to accept them in payment for the work performed by it under its contract with appellee. To reverse that judgment this appeal is prosecuted.

The objection urged by appellant to the validity of the two ordinances in question rests upon the false as-

sumption that they are measures or ordinances for raising revenue, within the meaning of Section 3060, Kentucky Statutes, and therefore should have originated in the board of councilmen, instead of in the board of aldermen, of the appellee city. These ordinances are not ordinances for raising revenue, but are ordinances for creating debt. Neither of them provides for raising revenue for the city of Lexington, but to create a debt of the city which it will have to pay in the future. The first submitted to the voters of the city the question of incurring such indebtedness, and the election favored its being incurred by the city. The second was passed to declare the result of the election and provided for incurring the indebtedness by directing the issuing of the bonds. Neither of the ordinances levies a tax for the purpose of raising revenue. For these reasons neither can be said to be in violation of Section 3060, Kentucky Statutes, which provides:

"All ordinances and resolutions for raising revenue shall originate in the board of councilmen, but the board of aldermen may propose amendments thereto; *Provided*, no new matter is introduced under color of amendment which does not relate to raising revenue."

The cases of *Commonwealth v. Bailey*, 81 Ky., 395, and *Thierman Co. v. Commonwealth*, 123 Ky., 740, relied on by appellant, do not, in our opinion, sustain its contention. In the *Bailey* case the constitutionality of "An Act to Regulate the Fees and Salaries of Certain Public Officers," approved April 9, 1880, and to compel the appellee as marshal of the Louisville Chancery Court, to make a statement or report of all salaries, fees, emoluments and perquisites received by him for his services as marshal during that part of the year 1880 subsequent to the passage of the act, was called in question. It was admitted that the bill originated in the Senate, and for that reason it was claimed that the act violated Section 30, Article 2, Constitution of 1849, which, like that of Section 47 of the present Constitution, declares:

"All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments thereto; *Provided*, no new matter shall be introduced under color of amendment, which does not relate to raising revenue."

We, however, held that the act was not one for raising revenue. In the opinion it is said:



"According to Mr. Story, Section 874, Section 7, Article 1, of the Constitution of the United States, which is in the exact language of the first clause of the section above quoted from the present Constitution of the State, means what are usually termed 'money bills' and that, in practice, the constitutional provision is applied to bills to *levy* taxes in the strict sense of the word. \* \* \* It is clear from every source that the terms 'bills for raising revenue' are confined to bills to levy taxes in the strict sense of the word, and do not embrace bills for other purposes which incidentally create revenue, unless so framed as to draw money from the people, with no other advantage or benefit to them except the general protection which belongs to the citizen under our form of government as a matter of common right."

In *Thierman Co. v. Commonwealth*, the act involved also originated in the Senate, but as it, in addition to providing penalties for the violation of its provisions, also levied a tax of fifty cents on each barrel of spirits compounded, etc., and required its collection by the auditor, it was held to be a bill having for its primary object the raising of revenue, and therefore violated Section 47 of the Constitution of the State.

We do not agree with counsel for appellant that the second ordinance, No. 3092, is "unmistakably an ordinance for raising revenue." It is true that it provides that an annual tax be levied on all the taxable property of the city of Lexington, but it will be observed that it does not fix or indicate the amount of such tax. It merely provides that there shall be levied by the general council of the city of Lexington an annual tax, which levy the general council must make year by year for the purpose of providing for the payment of the interest on the bonds as it shall become due, and to create a sinking fund for the purpose of retiring them at maturity. The levy of the tax, which includes the fixing of the tax rate and authority to collect it, is left wholly to the future action of the general council. When such levies are made they must originate in and be passed by the board of councilmen and thereafter be also passed by the board of aldermen. In other words, the ordinance in question merely makes provision for the future levy and collection of an annual tax for the payment of the bonds and interest as required by the statute, but the statute does not require that this ordinance shall actually levy any

tax or raise any revenue. On the contrary, the statute merely provides, as the ordinance directs, "That it shall be the duty of the general council *in each year thereafter*, at the time at which other taxes are levied and collected, to levy and collect a tax sufficient for such purpose." *Link v. Karb* (Ohio), 104 N. E., 632. Manifestly no tax collector could have claimed or exercised the right to collect a tax under ordinance No. 3092, for it fixes no tax rate. It follows from what has been said that neither of the ordinances in question is, in our opinion, open to the objection made by appellant to its validity.

Appellant's third contention, that the publication of ordinance No. 3019 was not sufficient to give legal notice of the election, presents a more serious question. Section 12 of the act of 1910 provided:

"If, in any year, the general council shall deem it necessary to incur any indebtedness, the payment of which cannot be met without exceeding the income and revenue provided for the city for that particular year, it shall, by ordinance, order an election by the qualified electors of the city to be held, to determine whether such indebtedness shall be incurred. Such ordinance shall specify the amount of indebtedness proposed to be incurred, the purpose or purposes of the same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund, as herein provided. *Such ordinance shall be published for at least two weeks just preceding the election* in the official newspaper in and for such city, or by posting written or printed copies thereof at three or more public places in such city, if there be no such official newspaper."

It is admitted that the *Lexington Herald*, a daily publication, was then, and is at this time, the official newspaper of the appellee city, and that the only publication of ordinance No. 3019 was made in and by the *Lexington Herald*. It first appeared therein October 3, 1912, but this publication, it is alleged in the answer and admitted by the demurrer, was made only for the purpose of complying with the provisions of Section 3045, Kentucky Statutes, requiring all ordinances of cities of the second class to be so published to give them validity. The ordinance was again published in the *Lexington Herald* on October 27, 28, 29, 30, 31, November 1, 2, 3, 4, 5. It is further admitted that October 27, the day on

which the ordinance was the second time published, but first legally published as a notice to the voters of the time, place and purpose of the election, was Sunday; and that November 5, the day it was last published, was the day during which the election was held. In *Ormsby v. City of Louisville*, 79 Ky., 197, we held that where publication of a levy ordinance of the city of Louisville was made on Sunday, and no other day, before seeking to enforce it, the publication was not such as the city charter required or the law of the State approves. That Sunday is not a judicial day, nor is it a day upon which any work, labor or calling can be legally pursued, unless of necessity or charity; and, furthermore, that such publication was of itself a violation of law, and no citizen, by any law of this State, was bound to read or take notice of it. So, if October 27 is not to be counted, there were nine days of publication, including the day of the election, remaining. If the 5th should not be counted, there would be but eight days left. Upon the other hand, if October 3, the day on which the ordinance was published for the purpose of giving it force as such, could properly be included, together with Sunday, the 27th of October, there would still be but eleven days' publication of the ordinance before the election.

In *Newton, etc., v. Ogden, etc.*, 126 Ky., 101, the question presented for decision was whether a local option election held on the 6th day of December, 1906, violated Section 2555, Kentucky Statutes, which provides that such election "shall not be held on the same day with any political election, nor within thirty days next preceding or following any such regular political election." It appears that the regular political election was held on the 6th day of November and the local option election on the 6th day of December, 1906, the election being contested upon the ground that it was held within thirty days next following the regular election. If the day on which the regular election was held was to be included in the computation of time, the local option election was not held within thirty days. If the date of the regular election is excluded it was within the prohibited time. It was held that the day of the regular election was properly included as a part of the thirty days' time, for the reason that the holding of the regular election was an act done; therefore, as said in the opinion:

“The manner of computing time, when it becomes a question as to whether it shall be computed from an act done or the day upon which it was done, is altogether a matter of construction. In the absence of a statute controlling it, different rules have been adopted by courts of last resort; but in this State it has been settled by numerous adjudications that, when the computation has to be made from an act done, then the day on which it is done must be included; but, if it is to be made after or from the day it is done, the day must be excluded.”

It appears from the opinion that the right to include in the thirty days' time the day upon which the local option election was held was not questioned by court or counsel.

It is manifest in the instant case that there was not a sufficient publication of the ordinance providing for the holding of the election. Whether the provision of the act, *supra*, requiring it to be published for “at least two weeks just preceding the election,” be construed to mean each of the two weeks, running from Sunday to Saturday, inclusive, next preceding the week in which the election was held; or fourteen days just preceding the election and including the day thereof, under neither computation can it be made to appear that there was a publication of the ordinance for at least two weeks just preceding the election. The act does not require a daily publication of the ordinance for two weeks just preceding the election; therefore, it would seem that its publication once in each of the two weeks in a weekly newspaper would be sufficient, if made once in each of the two weeks just preceding the election, but, according to the admitted facts, even this was not done by appellee.

In *City of Chanute v. Davis*, 85 Kan., 188, the auditor of the city was mandamusd to register certain bonds issued by the city for waterworks purposes, his refusal to make the registration being based upon the fact that the statutory notice of the election authorizing the bonds was not given. The statute required that notice for the election should be published in at least one newspaper for three consecutive weeks, the first publication to be at least twenty days prior to the day fixed for such election. The election was called for Saturday, September 17, 1910. The notice was dated August 17, 1910, and was published in a daily newspaper for ten consecutive days, Sunday excepted, beginning

on Wednesday, August 17th, and ending on Saturday, August 27th. The notice was not published for three weeks, nor in three separate weeks, but the city showed that the subject of issuing waterworks bonds was one of great interest from the time the ordinance was passed until the election occurred, and was much discussed by voters and taxpayers. It was considered at a public meeting of the Commercial Club of the city and at a mass meeting of the citizens, and columns of the local newspapers were devoted to the subject from August 17th to September 17th. In view of these facts, it was insisted that the failure to give the statutory notice should be treated as an irregularity only and not as a jurisdictional defect. The court, however, in refusing to so treat it, said:

“The question here, however, is whether the court shall recognize a kind of publicity which has no legislative basis whatever upon which to rest in order to support a special election resulting in bonding the city, and thereby adding to the burdens of every taxpayer within its limits. The Legislature could not have been unmindful of the fact that proposed measures of this character would be discussed in private, in public, and by the press. Undoubtedly it took for granted the certainty of such publicity. Nevertheless, it provided for a specific notice, making a collective statement of all the information necessary for the guidance of a voter, to be published for a definite period of time. The court is not prepared to substitute its judgment for that of the Legislature and accept anticipated notoriety as the equivalent of official notice. \* \* \* If, therefore, general participation in an election of this kind may render the matter of legal notice inconsequential, as courts other than this one have sometimes held, the principle cannot be invoked here. The failure to give the statutory notice may have, in effect, deprived a sufficient number of qualified voters of their votes to change the result of the election. So far this court has uniformly held that statutory notice is essential to the validity of a special election. *George v. Oxford Township*, 16 Kan., 72; *The State, ex rel. v. Echols*, 41 Kan., 1; *The State v. Bentley*, 80 Kan., 227; *Rice v. Robson*, 83 Kan., 252.”

In *State v. Mayor, etc.* (N. Jersey Sup. Ct.), 38 Atl., 750, the court had under consideration an act providing for the calling of special elections to determine whether

there should be an issue of bonds in certain cases by municipalities. The statute required twenty days' notice of such election by publication after the adoption of the resolution calling the election had been signed by the mayor. The election being held May 18, 1897, and the notice thereof given April 27, 1897, and before the mayor approved the resolution on April 30, 1897. In holding the notice insufficient the court said:

"As above stated, the mayor's approval was on April 30, 1897, and therefore the notice of the special election published before that day was abortive; and, as there was less than 20 days' time between such approval and the date of the election, no legal notice thereof could be given. The requirement of notice of a special election is mandatory. *Morgan v. Gloucester City*, 44 N. J. Law, 137. The election, therefore, of May 18, 1897, was nugatory."

The cases in other jurisdictions relied on by appellee's counsel as sustaining the sufficiency of the notice given of the election here involved, are based upon statutes unlike that of this State, or attempted to be supported by reasoning we think it unwise to adopt. The provision of the act, *supra*, as to the publication of notice of the election is clearly mandatory; therefore, it will not do to say that anything short of a substantial compliance therewith will suffice; and, obviously, such a failure to obey its requirements as is here shown, must be regarded as fatal to the validity of the bonds issued by the appellee city pursuant to the election.

For the reasons indicated, the judgment is reversed and cause remanded with directions to the circuit court to overrule the demurrer to appellant's answer and sustain the demurrer to appellee's petition, and for further proceedings consistent with the opinion.

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### Bruce v. Scully.

(Decided January 22, 1915.)

#### Appeal from Kenton Circuit Court (Common Law and Equity Division).

1. **Malicious Prosecution—Probable Cause—Question for Jury.**—Whether the facts proven, in attempting to show a probable cause for the prosecution of another, are sufficient to make a probable cause is a question of law, exclusively for the court.

2. **Malicious Prosecution—Probable Cause—Question for Jury.**—If the facts relied upon to show probable cause in a suit of malicious prosecution are disputed, then as to whether or not such facts exist, is a question for the jury under proper instructions.
3. **Malicious Prosecution—Probable Cause—Burden of Proof.**—In a suit for damages for malicious prosecution, the burden of proof is upon the plaintiff to show want of probable cause as well as malice in the defendant, who is charged with instituting the prosecution, upon which the suit is founded.
4. **Malicious Prosecution—Probable Cause—Question for Jury.**—If the evidence for plaintiff shows conclusively from undisputed facts that the defendant had probable cause for the institution against plaintiff of the prosecution complained of, there is no question for the jury, and the court should direct a verdict for the defendant.

O. M. ROGERS for appellant.

JOHN B. O'NEAL and BYRNE & READ for appellee.

#### OPINION OF THE COURT BY JUDGE HURT—Affirming.

The appellant, Kate Bruce, filed her petition in the Kenton Circuit Court, in which she alleged that the appellee, Elizabeth Scully, had made an affidavit before a justice of the peace, charging her with the offense of using abusive and insulting language in the presence of other persons with the intent to provoke an assault, and caused her to be arrested upon that charge and tried before the justice of the peace, and a jury, and that the trial resulted in an acquittal, and that said prosecution was set on foot by the appellee with malice against her and without probable cause for so doing, and asked a judgment against the appellee in the sum of \$10,000.00. The appellee, by answer, admitted the taking out of the warrant alleged to have been issued, and the trial and acquittal of the appellant upon that charge, but denied that she did same maliciously or without probable cause, and affirmatively pleaded and set forth facts showing that she did have a probable cause for causing the arrest of the appellant upon that charge. The appellant, by reply, traversed the affirmative allegations in the answer, and upon these issues the case went to trial.

After appellant had testified and had introduced her other evidence in chief, the appellee moved the court to instruct the jury peremptorily to find a verdict for her. After consideration the court sustained this motion, and directed the jury to find a verdict for appellee, which was

done. The appellant filed grounds and made a motion to set aside the verdict, and to grant her a new trial, which motion being overruled, she has appealed to this court.

Evidence offered in the case shows the facts to be that the appellant and appellee resided in the same house, and engaged in a quarrel on account of appellee lowering her slops from an upstairs window to the ground, passing the window in a room occupied by the appellant on the lower floor of the building. The appellant, in her testimony, stated that the appellee abused her very considerably, and that she made the following statement to appellee:

"Look here, be careful the names you are calling; don't think everybody is like yourself, because you bring Judge Shoborg down here, and his family \* \* \* I told her because Judge Shoborg came down there, I said—You got by with old man McDonald's money so easy the way you did, you can't call everybody names and get by with it so easy." On cross-examination she was asked the following questions and gave the following answers:

"Q. I understood you to say that on the 15th day of July you did say to Mrs. Scully that she had taken old man McDonald's money and gotten by with it—is that the language you used to her? A. Yes, sir. Q. You said she was having Shoborg come there to her house, and she had gotten by with that? A. Yes, sir."

The use of this language by the appellant to the appellee in the presence of appellee and some others present, in the opinion of the court below, conclusively shows probable cause for the appellee to have appellant arrested and tried upon the charge. In this opinion of the trial judge we concur. Evidently this language by the appellant was used by her with the purpose of charging the appellee with some improper conduct, if not with something very disreputable, and we do not think that any reasonable mind could give it any other meaning. The meaning of the expression "to get by" and what it conveys is well understood. It means that the person referred to has done some act and has escaped the injurious and detrimental consequences which usually attend such an act. It does not seem that Judge Shoborg's name had been mentioned in the quarrel or that he had any connection with the matter in hand, and the



appellant's statement that the appellee had brought Shoborg to her house and "gotten by" with it can have but one meaning, which is very evident, because there could be no injurious consequences to get by with if the transaction was proper. This expression, "to get by" with is never applied except to actions which necessarily have an injurious and detrimental consequence. The charge that appellee had gotten old man McDonald's money and "gotten by" with that so easy could have no meaning, to any reasonable mind, unless it meant that appellee had obtained McDonald's money by some improper and disreputable means. It would be improbable, under the circumstances under which the language was used, to attach any other meaning to these remarks by appellant, except that they were insulting and were used by the appellant to the appellee for the purpose of insulting her and to provoke an assault from her.

The want of probable cause for setting on foot a criminal prosecution is as fatal to the suit of plaintiff in a suit of this character as it is to fail to charge that the prosecution was instituted by the party doing it from malicious motives. What is necessary to allege is also necessary to prove. In *Garrard v. Willett* (4 J. J. M., 628) this court said: "But, as the plaintiff must prove malice, proof of the want of probable cause devolves on him;" and, in the same opinion, further held "that an allegation of probable cause in the petition was indispensable, and the acquittal of the accused would not prove a want of probable cause conclusively."

In Volume 26, page 86, of the *Cyclopedia of Law and Procedure*, it is said: "The burden of proving the concurrence of malice and want of probable cause is on the plaintiff;" and on page 83 of same work it is said: "The burden of proof in the first instance, according to the general rule, rests upon the plaintiff, when the general issue is tendered, to prove every essential element of this specific tort, in order that he may make out a *prima facie* case. \* \* \* If he fails to sustain the burden of proof, the defendant ordinarily has no occasion to offer evidence in his own defense."

While in some jurisdictions the burden of proving the want of probable cause is put upon the defendant, but in this State and the general rule prevailing everywhere is, that the burden is upon the plaintiff to prove

the want of probable cause for a prosecution against him, as well as to prove malice or facts from which malice may be inferred. If the evidence offered by the plaintiff himself shows conclusively that the defendant, in a suit of this kind, was not without probable cause to institute and carry on the prosecution complained of, then the plaintiff's case must necessarily fail upon his own evidence, and there is nothing to be submitted to the jury.

In *Lancaster v. Langston* (18 R., 299) this court held that what facts and circumstances amount to probable cause is a question of law for the court, and whether the facts and circumstances put in evidence exist or not, in any particular case, is a question of fact for the jury. If the facts insisted upon as showing the existence of probable cause for instituting a criminal or penal prosecution are denied an issue is made in the evidence as to whether or not said facts exist, it would then be the duty of a trial court to submit the question as to whether or not said facts do exist to the jury under proper instructions. But where the facts are undisputed, and, as in this case, are admitted by the appellant herself, there can be nothing to submit to a jury upon the question of probable cause, but it becomes a matter exclusively for a decision of the court. This court, in the case of *Farris v. Starks* (3 B. M., 4), defined probable cause as being such grounds as would induce a man of ordinary prudence and discretion to believe in the guilt and expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation. In the case at bar the language which appellant admits that she used to the appellee was such that we do not think that any prudent person could fail to have a belief in the guilt of the appellant upon the charge upon which she was prosecuted, and to reasonably expect her conviction upon that charge. It being, then, the duty of the court to determine as to whether or not the language conclusively shows probable cause for the appellee to act upon in instituting the prosecution against appellant in the justice's court, and the trial court being of the opinion that the language was sufficient to justify a reasonably prudent and cautious person in believing in the guilt of the appellant and expectation of her conviction upon that charge, there was then no cause of action left for the appellant against

the appellee, and the action of the court in directing a verdict for the appellee was proper.

The contention of appellant that the language used by the appellee to her was of an insulting nature and justified her in using the language which she admits that she used, we do not think is founded in any good reason. One person cannot escape the consequences of the violation of the offense denounced in Section 1271 of the Kentucky Statutes, by showing that the person to whom insulting language was used was at the same time guilty of a violation of said statute also.

The judgment appealed from is, therefore, affirmed.

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**G. I. Frazier Company v. Owensboro Stave & Barrel Company.**

(Decided January 22, 1915.)

Appeal from Daviess Circuit Court.

1. **Contracts—Sale of Personal Property—Intention of Parties.**—In a contract for the sale of personal property, the intention of the parties controls, as to whether the title passes or does not pass, regardless of all other circumstances of the transaction.
2. **Contracts—Sale of Personal Property—Title.**—Before the title to personal property passes from the vendor to the vendee, the price must be agreed upon, or some method agreed upon by which the total price can be definitely ascertained.
3. **Contracts—Sale of Personal Property—Inspection.**—Where property, such as staves, is shipped by a common carrier from a distant point to a purchaser, and he has had no opportunity for inspection, he has a right to inspect the property before receiving it, to determine whether it is in accordance with the contract or not, and if not in accordance with the contract, to reject it, unless it appears from the contract that it was intended for the title to it to pass to the purchaser without inspection.
4. **Contracts—Intention of Parties—How Determined.**—In determining what was the intention of the parties in a contract for the sale of personal property, the court should look to all of the facts and circumstances, and the customs of the trade in such commodity.

C. W. WELLS, W. F. HAYS and JORDAN STOKES, JR., for appellant.

SHEILD, CAMPBELL & McATEE and LE VEGA CLEMENTS for appellee.

**OPINION OF THE COURT BY JUDGE HURT—Affirming.**

The G. I. Frazier Company was the appellant, doing business as a stave dealer, with office in Nashville, Tennessee. Hiram Blow and Company was a partnership, which was engaged in dealing in barrel staves, with offices in Nashville, Tennessee, in the same building in which G. I. Frazier had his office. V. J. Blow had control of the active management of the affairs of Hiram Blow & Company, and H. B. Carter was also a general manager for Hiram Blow & Company. The Owensboro Stave & Barrel Company was a corporation, engaged in the business of a cooper at Owensboro, Kentucky.

V. J. Blow was the president of the Owensboro Stave & Barrel Company, and had control of the management of its affairs as its general manager until about the first of July, 1910, when the directors at a meeting removed him from the management and invested R. S. Dinwiddie with the business of general manager of the affairs of the corporation. Some time previous to the shipping of the staves in controversy, V. J. Blow, acting for Hiram Blow & Company, and R. S. Dinwiddie, acting for the Owensboro Stave & Barrel Company, which hereafter we will call the appellee, made an arrangement whereby it was agreed that Hiram Blow & Company would furnish all of the staves, similar to the ones in controversy, at \$1.50 per set (a set being a sufficiency of staves to make a barrel which was 81 inches in circumference), which were needed by the appellee, over and above what it could buy from other sources. Toward the latter part of July, 1911, Hiram Blow & Company gave G. I. Frazier Company, whom we will hereafter call the appellant, an order to ship to the appellee the two carloads of staves in controversy, at Owensboro, Kentucky, which appellant did, consigning them to himself. The appellant bought the staves from the Brown Stave Company, at Monroe, Louisiana. When appellant received the bills of lading he endorsed them "in blank" and delivered the bills to Hiram Blow & Company, and at the same time charged the staves to Hiram Blow & Company upon his books. Hiram Blow & Company then delivered the bills to the appellee, and at the same time sent it an invoice, in which the price of the staves was stated as being \$1.75 per set. At the same time Hiram Blow & Company charged the staves to appellee upon its books, and credited appellant with them. The staves arrived at

the railroad station at Owensboro about the last of July or the first of August, 1911. The negotiations between Hiram Blow & Company and appellee were thence forward conducted through the medium of letters dispatched by the mails. On August 3rd Hiram Blow & Company wrote to appellee in substance acknowledging receipt of appellee's communication in regard to the staves, and asking it to "get a report from Joe on this, as Mr. Frazier is exceedingly anxious to have it and there is no reason why Joe can't make some kind of a report and we can settle with Frazier and fight the matter of price out between you." What the communication was that the above letter was in response to does not appear.

On August 7th appellee wrote to Hiram Blow & Company that Joe had shown Dinwiddie the bills of the staves, and "it could not pay more than \$1.50 per set for them. Please advise if the above is satisfactory before we unload them." It appears that between this date and August 14th that Hiram Blow & Company had written appellee and requested it to send them "some acceptances." This letter does not appear in the evidence.

On the 14th day of August appellee wrote Blow & Company, saying: "Enclosed please find our acceptances on the three last cars shipped us. You will note we have not inspected these cars or gotten the freight amounts to deduct, which will be charged to your account." There were two of the acceptances, one for the sum of \$1,159.50, which was endorsed that it was in payment of staves in car No. 24128, I. C., and the other acceptance was for the sum of \$1,140.00, and endorsed that it was for the payment of staves in car No. 25797 V. S. & P. These were the cars containing the staves in controversy. These acceptances were drawn in favor of Blow & Company, and promised the payment of the amounts respectively, the one thirty days after date, and the other forty-five days after date. Blow & Company accepted said "acceptances" and at once negotiated them, and thereafter they were paid by appellee, the one on September 14th and the other on September 29th. Instead of Blow & Company entering the acceptances as payment for said two cars of staves, as directed by appellee, it credited them upon appellee's general account. Upon the same day, August 14th, upon which appellee mailed the acceptances to Blow & Company, Blow &

Company wrote to appellee saying, in substance, that appellee's communication of the 3rd "would have had more prompt attention, but Carter has been away from Nashville, but on the staves I should like to have a full and complete report of just what the staves are that you have received, and I am quite positive that the price at which they are billed is not at all unreasonable, and that it would be a good idea for you to have some of them K. D. & S. staves on hand." Further: "I had Mr. McQuay write you a day or two ago asking you to send us some acceptances, which I trust you will do, and, if it is convenient for you to pay part cash, it will be quite acceptable to us. We will have no trouble in settling all matters, when we can get together for this purpose."

On the same day H. B. Carter, general manager of Hiram Blow & Company, reported to appellant that the staves shipped to Owensboro were not satisfactory to appellee, when appellant said to him, "Mr. Carter, see what they will allow you for the staves, and if we can, let us adjust it." On the same day Blow & Company wrote appellant in substance that the staves at Owensboro had been rejected, and that they desired to turn the staves over to appellant "so you may arrange a settlement on same." Further: "I am sorry that you have had this trouble on these shipments, but before we would want to take any further responsibility in regard to the staves you would have to make proper settlement with the Owensboro Stave & Barrel Company, and, therefore, we think it best to reject these staves." On the 15th day of August Blow & Company wrote appellee acknowledging receipt of its letter of the 14th, and saying that they desired a statement and report on the staves, and that they were crediting the acceptances on account and not against any particular car, and to get the report requested as quickly as possible, as they had rejected the staves to the party shipping, and do not consider the staves "our property until we come to some further adjustment." Further: "I am going to be in Louisville on Saturday, and I am anxious to see you in reference to the Owensboro situation, and, in fact, a number of matters." On August 21st appellee wrote to Blow & Company, in substance, saying that the first time Dinwiddie is in Owensboro that he will attend to the taking of the staves, and enclosed freight receipts paid for the staves, in the sum of \$200.00, and says:

"This and the acceptance you got is a right smart to be out on a lot of rejected stuff." It further added: "There was no use of getting into this, and if you had left these staves alone I could have bought them a great deal cheaper."

On August 24th appellees wrote Blow & Company that their letter of the 23rd relative to the staves, had been received, and that its foreman promised to get up a report on the staves upon that evening, and send it to them; that Dinwiddie would be away for a week, but when he returned that he would also inspect the staves.

On August 26th Blow & Company, in response to above letter, wrote appellee that they hoped to get report on the staves as soon as possible. On the 9th day of September appellee wrote Blow & Company saying that it enclosed a percentage of the staves; that Dinwiddie had gone through 500 in each car, but that the bundles had come apart and were in such shape they could not be counted; that directions had been given to count them when they had been straightened up, and further wrote: "If you want us to use them on this inspection, please advise. Of course, the count will all be credited to you when you get it."

On September 11th Blow & Company wrote appellee saying that they had received the inspection of the staves sent them on the 9th and that they noted that one car contained 91% prime staves and the other 85 1/3 prime staves; that what they wanted now to know is, how much allowance appellee wanted them to make for the staves which are not prime, and saying that they expected appellee to pay for the prime staves, the invoice price, and requested an answer by return mail as to "what allowance you want us to make for the stock which is not prime."

On September 13th appellee wrote Blow & Company that for the staves which would have to be re-jointed it would pay the price of the rejointed staves, less the expense of rejointing and what is cut away to make a smoother joint, which would be \$5.00 per thousand, and would pay for the oil staves \$30.00 per thousand, and, as to the prime staves, it would not pay the price at which they were billed; and further saying: "We have your agreement to adjust the price, if we would send the acceptances, which we did, and we expect you to stand up to this agreement. Now, if it is not

satisfactory with you for us to work these staves, please advise promptly, so we can let you take up the acceptances yourselves, you pay us the expense we have been out on them." On September 19th Blow & Company wrote appellee saying that they think the allowance asked for rejoining is rather heavy and that the price for the oil staves a little low, but if it could reduce the price for rejoining and make a little better price on the oils, "we can arrange a better settlement."

On September 21st appellee wrote Blow & Company saying to "please advise what price you should have for the oils, also what you think would be right for the jointing, and what would be cut away on the rough joint on these staves that are to be rejoined. As that is all there is between us, we can surely get together on that."

On September 29th appellee sent a complete report of the count and inspection of the staves, "which we had recounted at Owensboro. We are charging your account with the difference made by the grades."

This report shows that there were 1,532 sets of the staves, which, at the price allowed in the report, showed that the two acceptances over paid the amount which the staves were worth by the sum of \$155.93. The price of the prime staves being \$1.50 per set, and the oil staves and those necessary to be rejoined in both cars being valued altogether at \$117.04.

On October 7th Blow & Company wrote appellee saying that the settlement made of the stove matter as contained in appellee's letter of the 29th of September, is unsatisfactory, and that appellee, having some time ago rejected the staves, advised appellee under no circumstances to use any of them until the matter is adjusted; that they had rejected the staves from the party making the shipment and that he was unwilling to make the settlement suggested, "nor are we in turn willing to accept anything like \$1.50 per set for the staves delivered at Owensboro; therefore, we caution you not to use any of this stock, because it does not belong to us nor to you until the matter is definitely settled."

This communication was the last heard from Blow & Company in the negotiations, and either upon the 11th or 13th of October, thereafter, Blow & Company was adjudged a bankrupt, and on the 12th day of October the appellant set up his claim to the staves. He sent



several communications to the appellee, but we do not deem a reference to them necessary to a proper determination of this case.

The possession of the staves having been delivered to appellee by the delivery of the bills of lading to it, it thereafter took manual possession of them and used them, or the greater portion of them, in its business before the bringing of this suit.

On the 26th day of June, 1913, nearly two years after the transaction in regard to the staves, the appellant filed his petition in ordinary, alleging that he was the owner of the staves and that they were worth in the market \$1.63 per set, and that on the — day of September, 1911, the appellee had wrongfully converted them to its own use, and prayed a judgment in the sum of \$2,498.79 in damages against appellee.

The appellee, by its answer, traversed the ownership of the staves by appellant at the time of their conversion, and denied that they were worth more than \$1.50 per set, and affirmatively pleaded that it purchased the staves from Hiram Blow & Company under a contract, by which it was to pay Blow & Company \$1.50 per set for them, and that Blow & Company delivered the staves to it, and it had paid the contract price to Blow & Company for them as Blow & Company had requested. The appellant, by reply, denied the affirmative allegations in the answer and alleged that if appellee paid anything to Blow & Company that it was in satisfaction of an indebtedness other than for the staves, and that said payments were not accepted by Blow & Company in payment for the staves, and that he shipped the staves to Owensboro upon the request of Blow & Company, who had ordered them for appellee, and that appellee rejected the staves and would not receive or pay for them, of which Blow & Company notified appellant, and Blow & Company also rejected the staves, and that appellants acquiesced in said rejections, and continued to be the owner of the staves when they were converted, as alleged by the appellee.

The appellee, by rejoinder, traversed the allegations of the reply. The issues being thus joined, the case was tried by the court without the intervention of a jury. The court being of the opinion that the appellant has failed to manifest his right to a recovery, adjudged that his petition be dismissed, and in response to appellant's

demand that the court state in writing its finding of facts separate from its conclusions of law, filed a written opinion, embodying its separate findings of facts and conclusions of law, to which appellant excepted, and excepted to each separate finding of facts and conclusions of law, and then produced and filed a written motion and grounds for a new trial, and moved the court to set aside the judgment and to grant him a new trial, which the court overruled, to which appellant excepted, and now appeals to this court.

The grounds upon which appellant asks a reversal of the judgment below are: First, that the decision of the court and judgment are not sustained by sufficient evidence, and are contrary to the evidence and contrary to law. Second, that the court erred to his prejudice in admitting incompetent evidence offered by appellee, and in refusing competent evidence offered by appellant, and to which rulings of the court he excepted at the time. Third, because the court, although requested, failed to state separately its conclusions of law from its finding of facts, and because to the extent the opinion filed by the court did separate the conclusions of law and finding of facts, that said conclusions and findings were not supported by the evidence and were contrary to law.

The facts above stated in this case have been set out with particularity, because of the difficulty experienced in applying the well-settled rules of the law to the facts of this transaction.

It is an elementary principle of the law held everywhere that, in negotiations for the sale of personal property, that the title to the property passes to the seller from the buyer (when no other persons are concerned but the parties to the transaction), or does not pass according to the intent of the parties, and this intent will always control in the determination of whether or not the title to the property passes from the seller to the buyer, regardless of the other circumstances of the transaction. The difficulty in determining whether or not a sale of personal property has been made arises from the difficulty, if it exists, of determining what the intent of the parties was. The courts have from time to time, when the circumstances would otherwise leave the mind in doubt as to what the intent of the parties was, adopted rules applying to a certain state of facts

to assist in determining what was the intent of the parties to the transaction. One of these rules is, that where, under a contract for sale of personal property, it is delivered to the buyer, the presumption is usually indulged that the title has passed, unless a contrary intention is apparent from the agreement or circumstances, but if the parties agree thereto, the title may pass without a delivery. *Hagins, &c. v. Combs, etc.*, 102 Ky., 165.)

Another of these rules is, that where the property is in a condition to be delivered, but the property has to be weighed, measured, tested, or some act has to be done by the seller for the purpose of ascertaining the price, the title does not pass to the purchaser until such thing or things are done, but, where nothing of this kind remains to be done, and the parties intend it, the title passes immediately, though it yet has to be weighed, measured or tested to ascertain the total price. (*Newcomb, Buchanan & Co. v. Cabell, etc.*, 10 Bush, 460.)

In the case of *Thompson v. Brannin, Brand & Glover* (94 Ky., 490) this court said: "But whether a sale vests the right of property in the vendee presently, or not until the thing has been done by the vendor for ascertaining the weight, extent or price of such property, must, of course, depend upon the intention of the parties manifested by the character of the contract or circumstances under which it was made, and the question may be sometimes determined by the custom of the trade in respect to a particular commodity."

Where the seller, in accordance with the terms of the contract, delivers the goods to a common carrier for the purpose of having them transmitted to the buyer, it is presumed that the title to them passes to the buyer, unless the seller expressly reserves the right to dispose of them. The acceptance of payment or part payment from the buyer of the price of the goods delivered to the buyer is a strong presumption of the intention to pass the title and the payment on the part of the buyer is a strong presumption of the intention on his part to acquire title.

If one has the contract for the purchase of goods and receives and appropriates them to the contract, it is presumed that the title passes to the buyer, without the payment of the price. The weight of authority, however, requires that, before a sale of personal property

becomes complete, and the title passes, there must either be an agreement as to the price or an agreement by the terms of which the price can be certainly ascertained after the sale.

In the case of *Hagin v. Combs, etc., supra*, the contract was that the vendee should pay the vendor such a sum for the logs sold as would equal the most that any one would give the vendor for the logs at a certain named place, and the court held that was a sufficient agreement as to price to pass the title to the logs. Hay sold at so much per hundredweight, to remain in the possession of the vendor until it shall be weighed by the vendee, this court held, in *Burk v. Shannon* (11 R., 1171) to be a sufficient agreement as to price to pass the title.

If the seller has done all required of him by the contract, and the counting, weighing, testing, etc., to ascertain the whole price must be done by the vendee, the title passes, unless a contrary intention is apparent from the agreement and circumstances. It is not material as to whether or not the vendor is the owner of the property; if he is in position to deliver the goods and pass a perfect title, the title passes to the vendee when the parties so intend. (*Bell v. Offutt*, 10 Bush, 632.)

Another rule relative to sales is: "The intention of the parties must be gathered from the language or conduct of both, and the legal effect of what they say and do cannot be altered or modified by the undisclosed intention or secret understanding of either." (*Bell v. Offutt, supra*.)

There can be no doubt but what in a case like the one at bar, where the goods were shipped to the buyer from a distant point, and he had had no opportunity to inspect them, he would have a right to take them into possession by virtue of the bill of lading, for the purpose of making an inspection to determine whether or not they were in accordance with the contract of sale, and if the staves did not comply with the contract, to reject them, and, in this state of case, the delivery would not pass the title, unless the intention of the parties was that the title should pass without an inspection. It seems from the evidence in this case that it had been a custom of the stave dealing between Blow & Company and appellee that when staves were shipped to appellee by Blow & Company, and were accepted at a certain price, and the title passed to appellee, the appellee

still had a right to make a grading of the staves, and to make a claim against Blow & Company for a reduction of the total price on account of cull staves, and such as did not comply with the contract, and these inferior staves seem to have been sold to appellee at the market price for such character of staves. If the staves in controversy had been invoiced to appellee at \$1.50 per set, and the bill of lading delivered to it as it was, and appellee took them into possession as it did, and then paid for them, as it insisted that it did do, there could be no controversy as to whether or not the sale was made, but it seems that Blow & Company, although they charged appellee with the staves upon their books, and delivered the possession of them to appellee, by turning over to it the bill of lading, thereby evincing their intention to sell them to appellee, and to pass the title to them, the invoice price charged for them was \$1.75 per set, instead of \$1.50 per set, as per contract with appellee. Appellee exercised its right of inspection, and, on the 7th day of August, notified Blow & Company that it had seen the bills of lading and could not pay more than \$1.50 per set for them, and asked to be advised if that price was satisfactory before the staves were unloaded. This was a rejection of the staves at the price offered. On the 3rd of August Blow & Company had written appellee a letter which conclusively indicates that the invoice price was only tentative. From Blow & Company's letter to appellee, on the 14th day of August, it appears that some time between that date and the 7th that Blow & Company had written appellee regarding payment for the staves. Blow & Company must then have had appellee's letter before them in effect offering them \$1.50 per set for the staves. With this proposition of appellee before them, their request for the payment for the staves, or, in the language of the letter, to send them "some acceptances," it must be presumed that Blow & Company accepted said counter proposition, and appellee, on the 14th day of August, sent to Blow & Company "acceptances" covering the price of all of the staves at the price of \$1.50 per set. This was a meeting of the minds of the parties, so far as the price was concerned, and all the other essentials necessary to a sale of the staves had already been effected. The offer to sell had been made; the delivery had been made by the transfer and delivery of the bills of lading to appellee;

a sufficient inspection to satisfy appellee had either been made or waived; the price had been fixed and accepted; and payment in accordance with the price, and as directed by Blow & Company, who accepted the "acceptances," negotiated them, and appropriated the proceeds. It is true that, on the 14th day of August, the same day upon which appellee sent the "acceptances" to Blow & Company by mail, Blow & Company wrote appellant, notifying him that the staves had been rejected by appellee, and that Blow & Company also rejected the sale of the staves to them by appellant. It does not, however, appear that appellant, at that time, acquiesced in or agreed to rescind the sale of the staves that he had made to Blow & Company, and then, if ever he did so, does not appear, and he does no act indicating that he acquiesced in the rejection, except that at some time or other he credited Blow & Company by the staves upon his books. There is no doubt but what Blow & Company had authority to sell the staves at the time they accepted the counter proposition of appellee, by writing for the "acceptances," and at the time the "acceptances" were mailed to them. There is no dispute as to whether or not appellant had sold the staves to Blow & Company. He says that he had done so, and the general manager of Blow & Company says the same. Appellant had charged Blow & Company with them upon his books, and delivered them to Blow & Company by transferring the bills of lading to them. As to what the terms of the contract between them were we do not know. Appellant says that he knew at the time he sold the staves to Blow & Company that they were to be sold to appellee. When Blow & Company notified appellant that the staves had been rejected by appellee, this was on the 14th day of August, but, as before said, he does not appear to have accepted the rejection to him by Blow & Company, but, instead, instructed Blow & Company to ascertain what appellee would give for the staves, and to try to effect a settlement with it, if they could. He failed to notify appellee of his claim to ownership of the staves until either the day before or day after Blow & Company went into bankruptcy. He shows that he knew of the negotiations between appellee and Blow & Company, and knew of appellee's giving the "acceptances," and Blow & Company's receipt and appropriation of them. He knew of appellee's letter to

Blow & Company, on September 13th, when it notified Blow & Company if the settlement for the staves offered was not satisfactory, to notify it, so that it could let Blow & Company take care of the "acceptances" themselves, which Blow & Company did not do, and allowed appellee to pay the "acceptances," amounting to over \$2,200. He also knew that appellee was in ignorance of the negotiations between himself and Blow & Company. He had put the staves into Blow & Company's possession. Upon familiar principles, appellant is estopped to deny that Blow & Company had authority to sell the staves until he should withdraw his instructions to Blow & Company to settle the matter with appellee, and notify appellee of his claims.

It is insisted that Blow & Company did not accept the "acceptances" from appellee in payment for the staves, but credited them upon the general account of appellee with Blow & Company. By a very familiar law, Blow & Company had no right and could not accept said "acceptances" in payment for anything else except the staves. The "acceptances" had statements on them, designating the two cars of staves in controversy as being the ones for which the "acceptances" were given in payment, and appellee directed Blow & Company by letter to place them as a credit upon the price of these staves.

While there was some controversy between Blow & Company and appellee in regard to the state of their accounts, it appears that appellee, at the time the "acceptances" were given and accepted by Blow & Company did not owe them for anything except these staves and a carload of heading, and Blow & Company had nothing else, except this, to receive the "acceptances" in payment of. The correspondence between Blow & Company and appellee after August 14th seems to relate to a settlement between them on account of the claim against Blow & Company by appellee, on account of the inferior staves in the cars in controversy. Appellee never consented at any time that the "acceptances" should be applied to any other indebtedness than for the staves, although, on September 13th, appellee, by letter, substantially made the offer to Blow & Company to give up the staves if Blow & Company would pay the "acceptances" given in payment for the staves, which Blow & Company did not do. Appellant did not under-

take to claim the staves until Blow & Company was toppling into bankruptcy, and then waited from October 12th, 1911, until June 26th, 1913, to assert his claim by a suit.

As to the understandings which existed between Blow & Company and appellant, which were withheld from appellee, they do not affect the rights of the appellee in the matter, as their words and actions must be construed according to their legal effect, and must not be altered or modified by the undisclosed intention of either. (See *Bell v. Offutt, supra.*)

Being of the opinion, from all of the facts and circumstances in evidence, that the lower court did not err in its opinion, so far as denying the appellant the relief sought, the judgment appealed from is affirmed.

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### **Letcher Fiscal Court, etc. v. Spangler, et al.**

(Decided January 22, 1915.)

#### **Appeal from Letcher Circuit Court.**

**Counties—Liability on Implied Contract.**—A county is not liable on an implied contract growing out of the fact that it accepted services rendered or materials furnished; it can never become a debtor by implication, but only by virtue of an express contract, made by its authorized officers in the manner and form provided by law.

W. H. BLAIR and HALE & NEWMAN for appellants.

D. D. FIELDS and J. J. WAKEFIELD for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

This is an agreed case between the county of Letcher and its fiscal court on the one hand, and D. B. Spangler and others, who furnished the labor, materials and board for laborers in the construction of a public road in Letcher county, on the other, to determine whether or not the county is liable for the services rendered and materials and board so furnished. On final hearing the circuit court held the county liable, and directed the fiscal court to allow the claims and make the necessary appropriations therefor. From that judgment this appeal is prosecuted.



According to the agreed statement, the facts are as follows:

The Lexington & Eastern Railway Company, in building its line up the North Fork of the Kentucky River in Letcher county, so injured one of the county roads that it was impossible to rebuild it so as to make it satisfactory for public travel. Instead of attempting to put the old road in a satisfactory condition, the fiscal court of the county agreed to accept from the railroad company the sum of \$1,500 a mile for the construction of a road by the county in the place of the old road. Thereupon the fiscal court entered into a contract with one C. B. Donaghy, by which the latter agreed to build a new road for \$1,200 a mile. Subsequently it appeared that Donaghy was having great difficulty in securing labor and materials and board for the laborers working under him, and thereupon a supplemental contract was entered into by which the amounts due him under his contract should remain in the hands of the fiscal court, and be paid out directly to the laborers, materialmen and boarding house keepers. Donaghy proceeded with the work and incurred obligations in excess of the contract price of \$1,200 a mile. The fiscal court paid on the claims all the money on hand to the extent of \$1,200 a mile. The claims herein involved are for services, material, etc., in excess of \$1,200 a mile.

The only liability incurred by the county was to pay to the laborers, etc., the amount of money in its hands to the extent of \$1,200 a mile. It never obligated itself to pay anything in excess of that sum. There being no express contract, the question arises whether or not the county is liable by reason of the implied contract growing out of the fact that it accepted the services rendered or the materials furnished. We deem it unnecessary to enter into a lengthy discussion of this question. It is sufficient to say that it is the settled law of this State that a county, city or other municipality can never become a debtor by implication, but only by virtue of an express contract, made by its authorized officers in the manner and form provided by law. *Wortham v. Grayson Co. Court*, 13 Bush, 53; *Mitchell v. Henry Co.*, 124 Ky., 833; *Floyd Co. v. Allen*, 137 Ky., 575; *Perry Co. v. Engle*, 116 Ky., 594; *Murphy v. City of Louisville*, 9 Bush, 189; *Trustees of Bellevue v. Hohn*, 82 Ky., 1; *City of Covington v. Hallam & Meyers*, 16 Ky. L. R.,

128; *City of Owensboro v. Weir, &c.*, 95 Ky., 195; *District of Highlands v. Miche*, 32 Ky. L. R., 761, 107 S. W., 26; *City of Newport v. Schoolfield*, 142 Ky., 287; *City of Louisville v. Parsons*, 150 Ky., 420; *City of Bowling Green v. Gaines*, 123 Ky., 562; *Craycraft, &c. v. Selvage, &c.*, 10 Bush, 696; *Allen v. Co. Board of Education*, 148 Ky., 746; *Grinstead v. Monroe Co.*, 156 Ky., 296; *Rowe v. Alexander, Co. Atty.*, 156 Ky., 507; *Worrell Mfg. Co. v. City of Ashland*, 159 Ky., 656. It follows that the claimants are not entitled to recover.

Judgment reversed and cause remanded with directions to enter judgment in conformity to this opinion.

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**Oscar Davis' Administrator, et al. v. Ruth Davis, By et al.**

**I. W. Davis, Administrator v. Chitwood, et al.**

**Ruth Davis' Guardian v. Chitwood.**

(Decided January 26, 1915.)

Consolidated Causes from the McCreary Circuit Court.

1. **Executors and Administrators—Appointment Qualification and Tenure—Removal.**—An administrator properly appointed may not be removed without cause.
2. **Guardian and Ward—Appointment Qualification and Tenure—Removal.**—A guardian may be removed when evidently unsuited for the duties of the position.

STEPHENS & STEELY and H. M. CLINE for appellant.

J. SAMPSON, ROBERT HARDING, J. W. RAWLINGS and EMMET PURYEAR for appellee.

OPINION OF THE COURT BY JUDGE HANNAH—Affirming in part and reversing in part.

About November 15, 1913, Oscar Davis, twenty years of age, was killed by the overturning of a locomotive on the Cincinnati, New Orleans & Texas Pacific Railway, upon which he was working as a fireman.

Davis had been married, but had obtained a decree of divorce from his wife. She was restored to her maiden name, Wheeler Chitwood. They had one child, Ruth Davis, who was born in December, 1910.

A few days after the death of Oscar Davis I. W. Davis, his father, was, by appropriate proceedings had in the McCreary County Court, appointed administrator of his son's estate. He executed bond as such administrator, took the oath required, and entered upon the discharge of his duties.

Soon thereafter he employed attorneys to institute an action against the railway company to recover damages for the death of intestate.

On January 12, 1914, upon application of Wheeler Chitwood, the judge of the McCreary County Court removed I. W. Davis as administrator of the estate of his deceased son, and entered an order appointing Wheeler Chitwood administratrix thereof. From this order he appealed to the Circuit Court.

2. It further appears that I. W. Davis was also appointed by the McCreary County Court to be guardian of Ruth Davis, the infant daughter of his son.

On December 8, 1913, on motion of Mrs. Wheeler Chitwood, the mother of Ruth Davis, Davis was removed as guardian and Mrs. Chitwood was appointed guardian in his stead. From this order he also appealed to the circuit court.

3. On December 23, 1913, Ruth Davis, by her guardian, her mother, Mrs. Wheeler Chitwood, instituted a suit in equity in the McCreary Circuit Court against I. W. Davis, administrator of the estate of Oscar Davis, and the Cincinnati, New Orleans & Texas Pacific Railway Company, in which it was alleged that Davis had caused himself to be appointed administrator of the estate of his son, and had instituted an action as such administrator against the railway company, to recover damages for the death of his intestate; that, unless restrained by the court, he would, as administrator, make a settlement or adjustment of the claim for an inadequate amount, to the prejudice of the rights of Ruth Davis, the infant daughter of Oscar Davis.

It seems that this action was consolidated with the two appeals from the county court: (1) The appeal from the order removing Davis as administrator of his son's estate; and (2) the appeal from the order removing him as guardian of Ruth Davis.

The three cases were then tried together, and the court adjudged that (1) the county court properly removed Davis as administrator and appointed Mrs.

Wheeler Chitwood in his stead; (2) that the county court properly removed Davis as guardian of Ruth Davis, and properly appointed Mrs. Wheeler Chitwood in his stead; and (3) enjoined Davis as administrator from prosecuting the action against the railway company or making any settlement or adjustment thereof.

The concluding clause of the judgment is in the following language: "And on motion of Wheeler Chitwood, as administratrix of the estate of Oscar Davis, deceased, the case of I. W. Davis, administrator of the estate of Oscar Davis, deceased, against the Cincinnati, New Orleans & Texas Pacific Railway Company, same being ordinary action No. 122, is hereby dismissed; to all of which the defendant, I. W. Davis, as administrator of the estate of Oscar Davis, deceased, and as guardian of Ruth Davis, and Stephens & Steely, as his attorneys, object and except."

From this judgment, including the part just quoted, Davis appeals.

4. It is insisted by appellee that the circuit court erred in overruling her motion to dismiss the appeals from the county court, which motion was based upon the ground that Davis did not prepare a bill of exceptions covering the proceedings had in the county court, and that on this account the judgment of the lower court should be affirmed.

Appellee bases her contention in this respect upon the authority of *Holmes v. Robertson County Court*, 28 R., 283. But the rule applied in that case, and in *Hensley v. Metcalf County Court*, 25 R., 204, 74 S. W., 1054, does not apply in cases of this character. See *Wright v. Boswell's Guardian*, 103 S. W., 314, 31 R., 700. Appeals of this kind are tried in the circuit court entirely *de novo*, and no bill of exceptions covering the proceedings in the county court is required.

5. Concerning that branch of the appeal involving the removal of Davis as administrator of the estate of his deceased son, his appointment as administrator was proper under the provisions of Section 3896, Kentucky Statutes; and, having been so made, he could not be removed except for cause. *Williams Admr., ex parte*, 158 Ky., 61, 164 S. W., 307.

The only evidence offered by appellee in an endeavor to show cause for his removal and the only grounds stated by the county court were that his feelings toward the infant child of his son were hostile.

In the Williams case, *supra*, it was held that the county court had no power to remove an administrator upon the ground of a mere belief that the best interests of the estate of the decedent would be thereby conserved; and the court is of the opinion that in the case at bar appellee failed to show sufficient cause for the removal of Davis as administrator of the estate of his deceased son. The order of the county court to that effect was improper; wherefore the judgment of the circuit court in this respect is reversed.

6. As to the removal of Davis as guardian of Ruth Davis, the statute (Section 2024, Kentucky Statutes) confers power upon the county court to remove a guardian if such guardian is evidently unsuited for the duties of such position.

Ruth Davis is between three and four years of age. She, together with her mother, who is employed as a telephone operator, resides in the home of her mother's parents. The appellant is the paternal grandfather of the child, lives just across the street, but has rarely seen the child, has never exhibited any interest in or solicitude about its welfare; and, in fact, it seems, from the evidence, he has always entertained some doubt as to its paternity. He himself, when testifying, admitted that he had "no interest in the child," and that he "had never paid any attention to it;" that he never visited it at its mother's, and has never spoken to it when he saw the child on the street.

Under these circumstances, and in view of the fact that, under the statute (Section 2021, Kentucky Statutes), the child's mother was entitled to preference in the appointment of a guardian, we think the court properly removed Davis.

Owing to the confused state of the record, it is not at all clear that the order appointing Mrs. Chitwood to be guardian of her child was appealed from by Davis; but, as the matter seems to be tendered to us for decision by both appellant and appellee, without objection by either, we will treat it as properly before us.

Appellant, Davis, offered some evidence to show that appellee, Mrs. Chitwood, is not a suitable person to be appointed guardian of her child. The depositions seriously affecting her character were suppressed and she offered no evidence on the subject. Appellant contends that, as there were no exceptions filed to these deposi-

tions, the court erred in suppressing them, and that they should be considered here. We deem it unnecessary to pass upon the question further than to say that, even should they be considered by us, while we might hesitate to place this child under the control of appellee, were she a stranger to the child, the evidence is not sufficient to justify a court in taking the control of a child of this age from its mother, or removing her as its guardian.

The judgment of the circuit court in respect to the removal of appellant Davis as guardian of Ruth Davis and the appointment of Mrs. Chitwood in his stead is, therefore, affirmed.

7. Of course, it necessarily follows that the judgment of the circuit court, in so far as it enjoins Davis, as administrator, from prosecuting the action against the Cincinnati, New Orleans & Texas Pacific Railway Company, to recover damages for the death of his son, must be reversed.

8. It was not competent for the court, upon the trial of the three actions above mentioned, to adjudge a dismissal of the action brought by the administrator against the railway company. That was a separate action, and is unaffected by the language of the judgment here under consideration.

The judgment appealed from is affirmed in part and reversed in part, as indicated in the foregoing opinion.

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### **Lamar, et al. v. Crosby, et al.**

(Decided January 26, 1915.)

#### **Appeal from Hancock Circuit Court.**

1. **Wills—Construction—Designation of Devisees—Children—Classes.**—A general devise to the children of the testator includes a child en ventre sa mere at the time of the testator's death.
2. **Descent and Distribution—Persons Entitled and Their Respective Shares—Pretermitted Child.**—Where there is a general devise to "the children" of testator without specifically naming them, a child en ventre sa mere at the death of the testator, although posthumous, is not pretermitted. All the children are included, and therefore none are pretermitted.

**W. SCOTT MORRISON and J. R. HIGDON for appellants.**

**G. D. CHAMBERS for appellees.**

## OPINION OF THE COURT BY JUDGE HANNAH—Affirming.

Z. T. Crosby, a resident of Hancock county, died there domiciled on November 9th, 1893. His last will and testament, dated May 17, 1893, contained the following language, in so far as pertinent upon this appeal:

"It is my will that, after my funeral expenses and all my just debts shall have been paid, that my beloved wife, Vitula A. Crosby, shall live on my farm and have full control of same; but, if she shall leave said farm, I desire that it shall be rented out for the benefit of my children; or, if she should marry again and thereby cease to be my widow, then she is to have no further control or benefit of the farm; but, in that case, I desire that it shall be rented out for the benefit of my children until they become of age, when it may be equally divided between them."

At the date of this will Crosby had two children, William and Artie. Six months after his death another child, Ruth, was born to Mrs. Crosby.

The widow accepted the provisions of the will and continued to reside upon the farm mentioned in the will until May, 1897, at which time she married B. H. Lamar and left the farm. After several years, however, she returned and took possession of it.

Ruth Crosby, the posthumous child, married Larus Rice, but died before reaching the age of twenty-one years, and without issue.

On June 27, 1913, William Crosby, Artie Crosby, Ruth Crosby Rice and her husband, Larus Rice, instituted an action against Vitula Lamar and B. H. Lamar, in the Hancock Circuit Court, to recover possession of the farm mentioned.

On March 2, 1914, an amended petition was filed therein by plaintiffs, William Crosby, Artie Crosby and Larus Rice, reciting the fact of the death of Ruth and claiming the ownership of the farm to be in William Crosby and Artie Crosby, subject to the interest of Larus Rice as surviving husband of Ruth Crosby Rice.

The defendants answered, claiming that the defendant, Vitula Lamar, was the owner of an undivided one-third interest in the farm by descent from her daughter, Ruth Crosby Rice.

A demurrer to this answer was interposed and the cause being submitted thereupon the same was sustained and defendants, refusing to plead further. the court ad-

judged that William Crosby and Artie Crosby were the owners of the farm subject to the statutory life estate of Larus Rice in one-ninth thereof. From that judgment the Lamars appeal.

1. It is claimed by appellant, Mrs. Lamar, that her daughter, Ruth Crosby Rice, was a pretermitted child, and that, under Section 4848, Kentucky Statutes, she took an undivided one-third interest in the farm, not by descent from her father, however, but by contribution from her two brothers; it being the contention of appellant that the two brothers took each a one-half interest in the farm as devisees under their father's will, but, by virtue of the statute mentioned, were required to make up their sister's share, as a pretermitted child, by contribution; that, therefore, the interest of the daughter Ruth descended, under Sub-section 2 of Section 1393, Kentucky Statutes, to her mother.

Appellees seem to concede that their sister Ruth is a pretermitted child; but they contend that, although under the statute, her share is made up by contribution, yet, in point of fact, it was derived by descent from her father by virtue of the statute; and that, therefore, it descended to them under Section 1401, Kentucky Statutes.

Ruth Crosby Rice was a posthumous child, but she was not a pretermitted child. By his will her father devised the farm "to his children" as a class, without specifically naming them. Had he named William and Artie Crosby in the will as his "children," and had Ruth Crosby (of whose existence *en ventre sa mere* the law presumes her father had knowledge at the time of his death) not been provided for or expressly excluded by the will, then she would have been, in law, a pretermitted child within the purview of Section 4848, Kentucky Statutes.

The statute on pretermittance was enacted to relieve against unintentional disherison of a testator's children; but in the case at bar the testator did not unintentionally omit to make provision for Ruth Crosby; he devised the farm to "his children," and at the time of his death, in law, she was one of them.

Subject to the qualification that it must be born alive, a child *en ventre sa mere* is, in law, considered *in esse* from the date of its conception, for all purposes beneficial to it. And the weight of authority in the United



States and in England is that, where a devise is made to the "children" of the testator, as a class, a child of the testator, *en ventre sa mere* at the time of the death of the testator, will be considered as included within the designated class, and will take under the devise. Such a child is included within the motive of the gift. *Adams v. Logan*, 6 T. B. M., 175; 119 A. S. R., 946, note; 7 Ann. Cas., 134, note; 43 Am. Dec., 474, note; 4 Kent's Comm., 13th Ed., Section 412; 40 Cyc., 1452, 1479.

In this State the court has gone so far as to hold that where there is a general devise to "the children" of another than the testator, such devise includes all the children of such person living at the death of the testator as well as any that may thereafter be born. *Lynn v. Hall*, 101 Ky., 738, 19 R., 996, 43 S. W., 402, 72 A. S. R., 439; *Gray v. Pash*, 66 S. W., 1026, 24 R., 963; *Goodridge v. Schafer*, 68 S. W., 411, 24 R., 219; *Caywood v. Jones*, 108 S. W., 888; *U. S. F. & G. Co. v. Douglas' Trustee*, 134 Ky., 374, 120 S. W., 328, 20 Ann. Cas., 993. In *Barker v. Barker*, 143 Ky., 66, 135 S. W., 396, it seems, however, that the rule laid down in the foregoing cases may be limited to devises to the children of a near relative, and not necessarily applicable where the devise was to the children of a stranger in blood to the testator.

These authorities are here mentioned only for the purpose of illustrating the rule that where a devise is to "the children" of a designated person, without specifically naming them, they take as a class.

So, although the child Ruth was *en ventre sa mere* at the time of her father's death, she was, nevertheless, his child at that time *in esse*, and she took as a devisee under the will in equal measure and in the same manner as the testator's other children, her brothers.

And, by Section 1401, Kentucky Statutes, her undivided one-third interest, which she acquired by devise under her father's will, descended to her brothers, subject only to the statutory life estate of her surviving husband in one-third of her interest.

The judgment of the lower court to this effect is, therefore, affirmed.

**Rock Creek Property Company v. Hill.**

(Decided January 26, 1915.)

**Appeal from McCreary Circuit Court.**

1. **Champerty and Maintenance—Instructions.**—Where no facts are proven sufficient to raise the question of champerty, no instruction should be given to the jury on that point.
2. **Trial—Submission to Jury.**—Where the essential facts of a case are uncontroverted and there is nothing but a question of law in the case, the same should not be submitted to a jury.
3. **Deeds—Description—Intention of Parties.**—A recital of quantity in a patent or deed is merely descriptive, and yields even to courses and distances, unless the instrument makes it clear that it was the intention to convey only a definite quantity.
4. **Deeds—Construction.**—The rule is well established in this State, that courses and distances yield to the calls for the lines of other patents, which are of record and susceptible of definite and certain location.
5. **Deeds—Intention of Parties.**—In the construction of deeds and conveyances the court seeks the intention of the parties.
6. **Patents—Boundaries.**—Where established lines are called for in a clear way, and where to follow or go to them, would do no violence to other surveys, then in order to locate a line as intended by the patentee, the court will consider the established lines called for in the patent as controlling.

O. H. WADDLE & SONS and J. N. SHARP for appellant.

W. R. CRESS & SON for appellee.

**OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

The appellant was the plaintiff below, and brought a suit in ejectment against the appellee, William Hill, to recover possession of land in what is now McCreary county. The suit was brought in Wayne county, and one trial was had there. It was transferred to McCreary, when that county was created. The case was submitted to a jury and Hill won.

In May, 1866, ten separate patents were issued to Fox, Hardin and Burke, partners. The surveys adjoin and are said to contain 200 acres each. Appellant claims under these patents. The land in controversy is within the boundary of three of these Fox patents. One of the Fox patents contains at least 300 acres and shows an unlocated exclusion of 75 acres in general terms, and conflicts with a senior patent taken out by Andrew Lewellen. But the conflict with that survey does not involve

more than 15 or 20 acres, and is not in issue. The defendant, William Hill, is the owner of the Lewellen survey and resides on it. There is no contest about his right to hold all of the Lewellen land; the controversy is as to his claim of title to about 100 acres south of the Lewellen line, and within the boundary of the Fox patent. He claims this boundary under a senior patent issued in 1859 to Harrison Bell and Coleman Bell, brothers.

The beginning corner of the survey of the Bell brothers is established beyond dispute, and is a maple, a corner to another patent issued to Harrison Bell in 1849. This maple is situated more than a mile from, and south of, the Lewellen land. From the maple a boundary with 13 calls is undisputed, and this is the southern boundary of the Bell brothers survey. The 13th call on the southern line stops on the south line of another Harrison Bell survey made in 1858. All the trouble comes from the effort to locate the remaining calls of the Bell brothers survey. These other calls begin at a stake on the Harrison Bell line, *thence N. 47 W. 40 poles to a stake; S. 40 W. 199 poles to a stake on Andrew Lewall's (Lewellen) line; thence binding on said line S. 55 E. 100 poles to a stake; thence N. 80 W. 100 poles to a stake on Bell and Dolin's line; thence binding on said line to the beginning.* The Andrew Lewellen line and the Bell and Dolin lines are established, marked and recognized by both parties, but to follow the course and distance call of N. 47 W. 40 will not come anywhere near the Lewellen line. If the call from the Harrison Bell line be changed from "N. 47 W." and run a course slightly west of north, or insert a due north call after the N. 47 W. call, and lengthen the line about 300 poles, instead of 40 poles, as called for in the patent, it will strike a corner of the Lewellen survey, and from which point a boundary line of that survey runs approximately the course next called for in the Bell brothers survey. After that call is so located, it is easy enough to follow the lines of the other patents named, and reach the maple tree at the beginning corner. But to do this the survey will contain 500 or 600 acres instead of 150, as called for in the patent, and as included within its boundary if the patent courses and distances be strictly followed. The question is, therefore, whether the courses and distances shall control or whether they shall be so changed as to reach and follow the Lewellen and Bell and Dolin lines;

that is, whether courses and distances shall yield to a line so marked as to rank it with fixed objects and natural barriers.

Neither party has had actual possession of the land in question for a sufficient time to give title by prescription. Two or three years before the suit was filed Hill built a cabin within the disputed territory and made a small clearing. For more than 20 years Hill and those under and through whom he claims have cut timber off of the land, but until the cabin was built there was no continuous possession. If the boundary be established by using the lines of the Lewellen and Bell and Dolin surveys called for, then Hill's claim must prevail, for the Bell brothers patent under which he claims is the oldest. The case is really a question of law, as the facts are admitted. But the lower court submitted the case to the jury on two questions and told them to find for the defendant: (1) If the land was included within the boundary of the Bell brothers survey, and (2) if the plaintiffs purchased it while the defendant Hill was in the actual possession. The jury found for Hill under the first instruction. The second instruction should not have been given, because there were no facts proven to raise the question of champerty. Neither should the first have been given, because, as already stated, there is nothing in this case but a question of law, for the essential facts are uncontroverted.

If the courses and distances are strictly followed, then the tract will contain only 150 acres, and this is the amount that the warrant and patent call for, and if so run it will not include the disputed 100 acres next to the Lewellen land. But it is well settled that a recital of quantity is merely descriptive, and yields even to courses and distances, unless the instrument makes it clear that it was the intention to convey only a definite quantity. *Jennings v. Monk*, 4 Met., 103; *Young v. Craig*, 2 Bibb., 270; *Mercer v. Bates*, 4 J. J. Mar., 344; *Alexander v. Hill*, 32 Ky. L. R., 1147.

Again, if courses and distances be strictly followed, then the calls for the Lewellen and Bell and Dolin patent lines must be ignored. The rule is well settled in this State that courses and distances must yield to calls for the lines of other patents which are of record, and susceptible of definite and certain location, as in this case. *Beshears v. Joseph*, 108 S. W., 307, lays down the rule as follows:

"That in determining boundaries marked corners are the more satisfactory evidence, then natural objects, such as streams, ridge and cliff, then calls for the lines of other patents, which are of record and susceptible to definite and certain location, then course, and lastly distance."

There was a somewhat similar state of facts in the case of *Alexander v. Hill*, *supra*, and the court said:

"This patent calls for a tract of land bounded by certain natural objects and artificial lines and established points, and provides that by following certain fixed courses and distances these natural objects and artificial lines and fixed points will be reached. But when it is shown by actual demonstration that when the lines are run according to the courses and distances called for the natural objects and artificial lines are not reached, what shall we do? \* \* \*

"This court has many times passed upon this question, and the law is now well settled that where there is a conflict between the course and distance and recognized objects establishing the boundary lines of a survey, course and distance must yield to natural objects and established boundaries of other tracts called for, and designated known points therein must be accepted as the true boundary of the land in question."

It may be conceded that the only lines actually surveyed when the warrant was laid were those shown by the first 13 calls in the patent, referred to above as constituting the southern boundary, and that to locate the Bell brothers patent by the surrounding lines as called for therein would differ materially from the plat of the original survey, which was filed with the land warrant and introduced as evidence on the trial. Mr. Rice, who made the survey, and is 76 years old, was introduced by the appellant and testifies that more than 50 years ago in company with the two Bell brothers, he did survey the southern boundary of 13 lines, and only those lines, and that then they told him they wanted to go from that place to the Lewellen land and follow the lines of that and Bell and Dolin to the beginning. He was told to prepare the warrant for 150 acres, but when he went home that night and made the plat, he saw that the survey would contain 600 acres, so, in order to make the warrant conform to the acreage called for, he cut down the distances without changing the courses or reference

to the patent lines called for. Without informing Bell brothers of the change, he sent the papers on to the land office at Frankfort, and the patent was issued in the form they now have it. It is apparent that the Bells never knew the surveyor had made any change in the plat, and their conduct with reference to timber cutting and subsequent conveyances are such as to show that their intention was to take title to all the land bounded by the Lewellen and the Bell and Dolin patents, and which, in their opinion, would amount to 150 acres. It is not necessary to discuss the competency of Mr. Rice's testimony, and for purposes of this case it may be accepted as admissible and true. While it serves to show the purpose of the surveyor, it does not weaken the evidence of the clear intent of the Bells, as above indicated. In the construction of deeds and conveyances the court seeks the intent of the parties to it.

Appellant contends that the rule that courses and distances yield to established lines does not apply where a material excess in acreage appears, and where the surveyor laid down most of the survey by protraction and the dispute was in that way brought about, and where the surveyor did not know the location of the patent lines called for as boundaries, and made a mistake in calling for them. In support of this claim appellant relies upon the cases of *Daniels v. New Era Land Co.*, 137 Ky., 535, and *Bryant v. Strunk*, 151 Ky., 97. The appellant, however, is in but little, if any, better position with reference to the excess acreage. Its patent relied upon chiefly to cover the 150 acres in conflict is subject to the same criticism. It not only contains 100 acres more than the patent calls for but has a general and unlocated exclusion of 75 acres. While the surveyor may not have known the location of the Lewellen and the Bell and Dolin lines called for, yet it does not follow that he made a mistake in calling for them. He inserted those calls because he was directed to do so by the patentees. Except that they told the surveyor they wanted to lay a warrant for 150 acres there is nothing to show that the Bell brothers made a mistake in calling for the patent lines. All the land within the boundary they named was vacant at the time, and they were familiar with the Lewellen line and were part owners of the lands bounded by the other lines referred to. The acreage was merely their opinion as to the quantity contained within the boundary which they named.

In the Daniels case, as shown by the record, there were over 20 lines and only two fixed objects named whereby to identify them. One was a tree at the beginning corner and the other was a tree at the end of the eleventh line. Stakes were called for as markers in all the other lines. Three of the calls were omitted by the copyist in issuing the patent. So, it will be seen, that practically the land was laid out by courses and distances only. But two fixed objects were called for, and they were of no assistance in determining the shape of the survey. The original plat has always been considered a potent fact to aid in the location of land, and in the Daniels case it was deemed controlling, because it was the best and only tangible evidence available. The conflict in the Daniels case was brought about by an error in the courses and distances named in the patent, and there being no monuments or established lines to guide the court in their location, it was held that the plat should control, and might be considered to correct a mistake in the patent. But it was none the less a question of evidence. It controlled, that is, outweighed the evidence as to courses and distances, because it was better evidence and, in the absence of monuments or established lines, it was the best evidence in the case.

In the Strunk case the court gave effect to the plat accompanying the land warrant rather than to the courses and distances of the patent. In doing so it ignored certain calls for established lines. This was justified by a combination of facts appearing in the case. Two of the facts appear in the case at bar, viz: The disputed lines were laid down by protraction—that is, were not surveyed, and the acreage was excessive—five times as much as the patent called for. The established lines were called for in such a confusing way as to make their control impracticable. More than that, there were nine calls given in the patent, and they were vague and some of them clearly erroneous, whereas it required about 40 lines for the surveyor to bound it at the time of the trial.

The ruling in the Daniels and Strunk cases was in no sense a departure from the rule as to relative weight to be given courses and distances, established lines and fixed objects. Where the established lines are called for in such a confusing way as to render it doubtful which one was intended, or where an attempt to follow or go to them would do violence to other surveys, then, in or-

der to locate the true lines, the court considered the original plat as controlling.

The judgment of the lower court located the Bell brothers survey by the established lines called for, and it is, therefore, affirmed.

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### **Pitts v. Hatton, et al.**

(Decided January 26, 1915.)

#### **Appeal from Estill Circuit Court.**

**Judgment—Enforcement of Lien—Erroneous.**—In a suit to foreclose a purchase money lien on certain real estate, a judgment rescinding the sale but granting plaintiff a writ of possession, and charging defendant with rent for the land from the date of the note was erroneous, when there was no plea or proof that plaintiff ever had or was entitled to possession of the land.

**HUGH RIDDELL and ROBERT R. FRIEND** for appellant.

**J. B. WHITE** for appellees.

#### **OPINION OF THE COURT BY JUDGE NUNN—Reversing.**

This is a suit to collect a \$25 purchase money note, and enforce a lien on the land for which, it is alleged, the note was executed. The tract contains 53 acres, and the rental value for the whole of it is worth no more than \$10 per annum, according to the testimony. The suit began in May, 1903. So far as the record discloses, the only written instrument in the whole transaction was the purchase money note sued on. It was executed in 1900 by Charles F. Puckett, in which he recites that he has "bought from John P. Hatton a tract of land for \$50 in which he has signed over such papers to me as I now hold. I have paid \$25 down, and \$25 to be paid in 1902. if such papers is sufficient to hold said land." It appears from the evidence that the papers "signed over" were surveyor's field notes. They were not introduced. The suit was brought by Hatton against Charles F. Puckett and Anderson Pitts, and, after setting up the execution and non-payment of the note, it is averred that:

"Puckett afterwards sold the land to the defendant Pitts and put him in possession thereof \* \* \* and



that the papers in contract under which the plaintiff sold said land to Puckett have been and are sufficient to hold said land and secure the same to the defendants."

Puckett does not answer and it does not appear that he was ever before the court. Pitts answered with a denial that Hatton sold the land to Puckett or put him in possession, or that Puckett sold the land to him; he denies that Hatton ever had title or possession. He claims to be the owner of the land by purchase from F. B. Russell, and says Russell purchased from the Furnace Company. He also claims title by more than 30 years' actual and continuous adverse possession. Plaintiff Hatton also claimed title through the Furnace Company. He said his mother bought it and died intestate, and that he inherited it from her, although he admitted that there were other heirs. There was no evidence in the case other than plaintiff Hatton's, and he in no wise connected the appellant Pitts with the Puckett trade or possession. So far as disclosed by this record, the only interest Hatton had in the land was a lien, and the court did not consider that enforceable. It was adjudged, however, that Hatton was entitled to a writ of possession against Pitts, and that Pitts should be charged with the rent of the land at \$10 per annum from the date of the note. It is from this judgment that the appeal is prosecuted. This judgment is clearly erroneous, because there is no plea or proof that Hatton ever had or was entitled to possession.

Hatton in his testimony says that he sold the land to Puckett, but admits that Puckett was then in possession of it. He does not claim that the relation of landlord and tenant existed. He says: "Puckett moved on it before I sold it to him; I don't know how he happened to go there." It is inferable from Hatton's testimony that Pitts was also in possession at the time, but Hatton admits that he knew Pitts claimed title by purchase from the Furnace Company. Since it is not claimed that Hatton was entitled to possession, the judgment of the lower court is reversed, with directions to set aside the writ of possession. Permission should be given to file such amended pleadings as are necessary to join issue on title and right of possession.

**Gaar, Scott & Company v. Vanhook.**

(Decided January 26, 1915.)

**Appeal from Scott Circuit Court.**

1. **Judgment—Vacation of—Petition for a New Trial.**—Under Sections 518, 520 and 521 of the Civil Code, the court rendering a judgment may vacate it on the petition of the defendant after the term, if it was obtained by the fraud of the successful party and the petition and evidence in support of it show that the defendant had a defense that would have defeated the rendition of the judgment. Under these code provisions the petition must set up a defense, and it must also be supported by evidence.
2. **Judgment—Vacation of—Petition for a New Trial.**—Where the holder of notes given for machinery represented to the payor of the notes that if he would surrender the machinery without a suit it would be accepted in satisfaction of the debt, the agreement to and the delivery of the machinery was a sufficient consideration to support the agreement of the holder of the notes, and if the payor by the fraud of the holder was induced to sign a paper believing that it embodied the agreement as he understood it when in fact it was an answer entering his appearance to a suit that had been brought, the judgment on his petition and evidence was properly vacated, it appearing that he did not know of the institution of the suit or that judgment had been rendered against him until long afterwards.
3. **Judgment—Vacation of—New Trial—Practice.**—In a suit seeking to vacate a judgment and obtain a new trial, where the petition and evidence show that the party is entitled to a new trial, the court may, on the pleading and evidence, vacate the judgment and permit the complaining party to file his answer in the original action, and a ruling like this will not bind the court when it comes to hear and determine the case on the pleadings and evidence in the original action, or it may determine the issues in the original action without any reference to the petition for a new trial or the judgment rendered therein. The court may in a suit for a new trial set aside the judgment in the original action and also determine finally the rights of the parties, or he may set aside the judgment and leave the rights of the parties to be finally determined in the hearing of the original action.

C. C. BAGBY, CHENAULT, HUGUELY and W. S. KELLY for appellant.

B. M. LEE for appellee. .

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellee, Vanhook, in June, 1908, purchased from the appellant, Gaar, Scott & Company, a threshing out-

fit for \$1,810, for which amount he executed several notes, and to secure the payment of these notes he executed a mortgage on the purchased property. On October 13, 1910, the company brought suit against Vanhook to obtain judgment for the balance due on its notes, which at that time amounted to some \$1,400, and it asked for a receiver and that the mortgaged property be sold to pay the debt.

A few days after this suit was filed Vanhook, by a paper signed by him, entered his appearance to the action and consented to the submission of the case at the court which was then in session, and on the day following the filing of this paper judgment went against Vanhook for the amount due on the notes, and an order was made directing the commissioner of the court to sell the mortgaged property.

In November, 1910, the property ordered to be sold, after having been first appraised at \$700, was offered for sale as directed in the judgment, and the company became the purchaser at the price of \$475. Subsequently this sale was confirmed.

In September, 1912, Vanhook filed in the Scott Circuit Court a suit in which he averred, in substance, that an agent of the company approached him on or about October 19, 1910, and told him that unless he paid or secured the unpaid notes due for the threshing outfit a suit would be filed to enforce the mortgage lien, but that if he would give up the machinery without a suit the company would accept it in full settlement of the balance due it, and thereupon he agreed to surrender the machinery in full settlement of the balance due by him to the company.

He further averred that the agent requested him to sign a paper showing that he had given up the machinery, and thereupon produced a writing which he represented to him was merely an agreement on his part to surrender any claim he had against the machinery and permit the company to take it in full settlement of its debt.

He further averred that by the fraud and over-reaching of the agent of the company he was induced to sign the paper believing that it was, as before stated, merely an agreement on his part to surrender the machinery in settlement of the debt, when, in fact, it was an answer to the petition entering his appearance to the action. That the judgment was entered against him in the suit

after the matters between himself and the company had been settled, as before stated, and that he did not know until long after the judgment had been entered, nor until an effort was made by the company to collect the balance due on the judgment after crediting the amount of the proceeds of the sale, that a judgment had been entered against him. He asked that the judgment be set aside and that he be granted a new trial in the action and given an opportunity to defend same, and for all proper relief.

In its answer, filed after a demurrer to the petition as amended had been overruled, the company, after denying all other averments of the petition, admitted that Layton, its agent, did procure the signature of Vanhook to the paper which was filed, and further averred that when the property was sold in November, 1910, Vanhook, who was paid by the commissioner of the court for so doing, brought the property to the place appointed by the commissioner for the purpose of selling it and was present at the sale, but did not make any objection thereto.

The evidence of Vanhook is that Layton told him when he brought the paper to him to sign that it was to show that he had given up the machinery, and that if he would sign it it would save the costs of a suit and would settle the debt.

He further said that at the time he signed the paper he did not know that suit had been brought against him or that the paper he signed was an answer in the suit, nor did he know it until several months afterwards when he discovered, through the fact that an execution had been levied on an interest he had in some land, that suit had been brought and judgment rendered. He further said that Layton read the paper to him, but he did not understand its meaning, and that he signed it because Layton advised him to do so and he believed it was a final settlement of the debt. He further testified that, although he sent the machinery to Georgetown so that it might be sold by the commissioner, he was not present at the sale, although he knew on the day the sale was made that the property had been sold and bought in by the company.

Layton testified, in substance, that he took the paper signed by Vanhook to have him sign it at the request of the attorney who brought this suit, in order that a judgment might be entered in the case at the term of court then in session without postponing the judgment until the

next term of the court, which would have been necessary except for the fact that the paper had been signed, as a summons could not be executed on Vanhook in time to get judgment at that term of the court. He said he had a very slight acquaintance with Vanhook, and denied that he made any representations whatever to him except to tell him that suit had been filed and that if he signed the paper a judgment would be rendered at the term of the court then in session and time and expense would be saved in that way; that the object in having the judgment of sale at that term of court was to allow the machinery to be sold and save the cost of putting it in the hands of a receiver.

F. M. Thomason, the commissioner of the court, said that before selling the property he wrote to Vanhook asking him to bring it to Georgetown on or before the day set for the sale, and that Vanhook told him over the telephone that a Mr. Steger would bring it in provided he, Thomason, would pay the charges, which he agreed to do, and did.

Upon the pleadings and evidence the court adjudged that Vanhook was entitled to a new trial of the original case of the company against him, and ordered that the judgment in favor of the company be set aside and that Vanhook be given until the first day of the next term to file an answer to the original suit of the company.

Section 518 of the Civil Code provides that "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it \* \* \* for fraud practiced by the successful party in obtaining the judgment."

Section 520 provides that "The proceedings to vacate or modify the judgment \* \* \* shall be by petition verified by affidavit, setting forth the judgment, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant."

Section 521 provides that "A judgment shall not be vacated on motion or petition until it be adjudged that there is a valid defense to the action in which the judgment is rendered."

And Section 522 provides that "The court may decide upon the grounds to vacate or modify a judgment before deciding upon the validity of the defense or cause of action."

Under these code provisions the defendant seeking to set aside a judgment on the ground of fraud must state in his petition sufficient grounds to authorize the vacation or modification of the judgment and the defense that he could and would have interposed to defeat the rendition of the judgment if he had not been prevented by the fraud alleged, and the averments of the petition must be supported by evidence. *Wireman v. Wireman*, 27 Ky. L. R., 961; *Prater v. Campbell*, 110 Ky., 23.

Therefore the question presented is, did the petition and evidence state grounds sufficient to authorize the vacation of the judgment? If it did, we think Vanhook was entitled to the relief sought.

It will be observed that Vanhook did not claim to have any defense against the notes or mortgage growing out of their execution. His defense was that a fraud was practiced upon him in obtaining his signature to the paper that entered his appearance to the action and consented that judgment might go against him at that term. If, as he alleged and testified, he believed that the paper he signed was merely an agreement on his part that if he would surrender possession of the machinery it would be accepted in satisfaction of the debt, the company had no right to take a judgment against him, or if it did take one, it should have endorsed it "satisfied" when he surrendered the machinery.

The fact that Vanhook agreed to surrender the machinery without a suit was a sufficient consideration to support the agreement of the company to take it in satisfaction of its debt. It was not essential to entitle Vanhook to the relief sought that he should have any defense against the notes or the mortgage growing out of their execution. It was sufficient if he had a defense that would have prevented the entry of the judgment against him or have justified the court in ordering it marked "satisfied." A defendant, within the meaning of the code, has a valid defense to an action if he has a defense that will prevent judgment going against him, no matter what the basis of this defense is.

It would be giving the code a very narrow and technical construction to say that a defendant must be able to make some defense affecting the execution of the note or demand sued on before he will be allowed to vacate a judgment obtained on the note or demand. If, for any sufficient cause, the judgment should not have gone

against him, he should, under the code, be allowed to vacate it. These code provisions were intended for the purpose of affording relief against judgments obtained by fraud, no matter in what the fraud consists, so that it is sufficient to authorize the vacation of the judgment and to constitute a sufficient reason why it should not have been entered.

We do not undertake to express any opinion as to how the case should be decided when it comes up regularly for hearing on the pleadings and evidence hereafter to be filed and taken in the original action, nor do we mean to say whether the evidence in the record is or is not sufficient to justify the court in ordering the judgment vacated when the case is finally heard. All that we do decide is that the court, on the pleadings and evidence, was justified in vacating the judgment and granting Vanhook a new trial. The judgment merely gives him opportunity to make his defense in the original action of the machine company against him, and when the case comes up for hearing in the trial court on the issues made by this defense and the evidence taken thereon, the court will not be in any manner bound or controlled by its judgment in granting Vanhook a new trial, but will hear and determine the issues in the original action without any reference to the action for a new trial or the judgment rendered therein.

In *Martin v. Conley*, 30 Ky. L. R., 728, it was held that in cases like this the court might, in a suit brought to obtain a new trial, set aside the judgment and also determine finally the rights of the parties, or it might set aside the judgment and leave the rights of the parties to be finally determined in the hearing of the original action, and this latter course the court pursued in this case, being authorized so to do by Section 522 of the Civil Code, *supra*.

The judgment is affirmed.

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**Thacker, By et al. v. Norfolk & Western Railway Company.**

(Decided January 26, 1915.)

Appeal from Boyd Circuit Court.

1. **Railroads—Crossing Accident—Right of Traveler at Private Crossing to Depend on Signals for a Public Crossing.—Persons**

using a private crossing who are in the habit of depending upon signals required to be given for a nearby public crossing are entitled to the benefit and protection of such signals, and if the company fails to give the public crossing signals and the traveler at the private crossing is injured as a result thereof, he may recover damages.

2. **Conflict of Laws—Torts—Action in This State to Recover for Injury Received in Another State.**—Where an action is brought in a court of this State to recover damages for personal injuries sustained in another State, the rights of the complaining party are to be determined by the laws of the State in which the injury occurred.
3. **Conflict of Laws—Torts—Pleadings.**—Where a common law action is brought in this State to recover damages for an alleged tort committed in another State, the plaintiff may set out a sufficient cause of action under the common law as administered in this State without setting up the law of the foreign State and averring that under the law of that State he was entitled to recover, as it will be presumed that the common law here in force prevails in the foreign State; and so it is incumbent upon the defendant, if he desires to defeat a recovery upon the ground that an action founded on common law principles could not be maintained in the State where the cause of action arose, to plead and prove the law of such State.

R. S. DINKLE, W. M. PRICHARD and R. C. PRESTON for appellants.

J. R. JOHNSON, JR., and HOLT, DUNCAN & HOLT for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

Milo Thacker, while crossing the track of the appellee railway company at a private farm crossing at a point on its track in Wayne county, West Virginia, was struck and injured by a passing train. In this suit brought in Boyd county, Kentucky, to recover damages for the injuries so sustained, the cause of action was rested on the alleged negligence of the company in failing to give the statutory signals for a public crossing a few hundred yards west of the private crossing and upon which statutory signals it was alleged persons using the private crossing depended and had a right to depend for warning of the approach of trains that crossed the public crossing before reaching the private crossing.

At the conclusion of the evidence the trial court directed a verdict for the railway company, upon the ground that, under the law of West Virginia, train signals at public crossings are not intended for the warn-



ing or protection of travelers at private crossings, and so a traveler at a private crossing who is struck by a passing train cannot maintain an action against the company because it has failed to give the statutory signals for a nearby public crossing, as a result of which failure he was struck and injured.

In this State the rule first announced in *Cahill v. Cincinnati Ry. Co.*, 92 Ky., 345, and consistently followed, is that persons using a private crossing, who are in the habit of depending upon signals required to be given for a nearby public crossing, are entitled to the benefit and protection of such signals, and if the company fails to give the required public crossing signals and the traveler using the nearby private crossing is injured as a result of this failure, while exercising care for his own safety, he may recover damages for the injury thus sustained. *L. & N. R. R. Co. v. Bodine*, 109 Ky., 509; *Early's Admr. v. Louisville, H. & St. L. Ry. Co.*, 115 Ky., 13; *L. & N. R. R. Co. v. Engleman's Admr.*, 135 Ky., 515; *C. & O. Ry. Co. v. Young's Admr.*, 146 Ky., 317.

But as the cause of action stated in the petition arose in the State of West Virginia, the rights of the appellant are to be determined by the laws of that State. In *Collins v. Norfolk & Western Ry. Co.*, 152 Ky., 755, we had under consideration a case presenting a question substantially the same as the one here raised, and in that case, after stating the West Virginia rule as announced in the cases of *Spicer v. C. & O. Ry. Co.*, 34 W. Va., 514, and *Christy's Admr. v. C. & O. Ry. Co.*, 35 W. Va., 117, we held that the failure of the railway company to give public crossing signals did not entitle a person injured at another point on the road to recover damages on account of such failure. Therefore, we feel obliged to hold that the ruling of the trial court was correct unless it be, as insisted by counsel for Thacker, that the West Virginia law was not sufficiently presented in the pleadings and evidence to warrant the trial court in assuming that the law of that State was as declared in the *Spicer* and other cases.

Where a common law action resting on common law principles is brought in this State to recover damages for an alleged tort committed in another State, the plaintiff may set out a sufficient cause of action under the common law as administered in this State and rely for recovery upon the law so administered and applicable

to his case. It is not essential that he should set up the law of the foreign State where the cause of action arose and aver that under the law of that State he was entitled to recover, as it will be presumed that the common law here in force prevails in the foreign State and that a cause of action that could be maintained under the common law of this State can likewise be maintained in this State under the common law rule of the State in which the cause of action arose. So that it is incumbent upon the defendant, if he desires to defeat a recovery upon the ground that an action founded on common law principles could not be maintained in the State where the cause of action arose upon the facts stated in the petition, to plead the law of the State in which the cause of action arose in such a manner as that it will appear from the pleadings that a recovery cannot be had. *Chesapeake & N. R. Co. v. Venable*, 111 Ky., 41; *L. & N. R. Co. v. Smith*, 135 Ky., 462; *Yellow Poplar Lumber Co. v. Ford*, 141 Ky., 5.

In an amended petition filed by the appellant Thacker it was averred that the private crossing at which he was injured was — feet west of the public county road crossing and that “said private crossing was and is near the public county road crossing; that signals from engines and trains approaching the public crossing were and are easily heard at said private crossing by persons attempting to cross same, and were relied on by persons using the private crossing as notice and warning of the approach of trains to said private crossing; that on the occasion of plaintiff’s injury he was attempting to cross said railroad at said private crossing, going from said Staley’s farm, where he was then living, to the public county road, when the defendant, its agents and servants in charge of one of its engines and trains, negligently and carelessly ran same over said crossing without keeping a lookout for persons attempting to cross said public road and private crossing, and without giving any warning by ringing the engine bell or blowing the whistle or other notice of its approach to said crossing. \* \* \*”

In answer to this pleading the company averred that “for further answer herein the defendant says that the accident and injury set up in plaintiff’s said petition occurred in Wayne county, State of West Virginia. That under the law of the State of West Virginia the defendant is not required to give warning of the approach of

its trains to private crossings by bell or by whistle, or to slacken the speed of its trains. That under the law of West Virginia the signals and warnings required to be given by trains approaching a public crossing are held to be for the exclusive benefit of persons using, or about to use, such public crossing and not for the benefit of persons using or crossing the track of the railroad company at any point other than a public crossing. The defendant says that the point of accident involved herein was at a private farm crossing and the defendant owed the plaintiff no further or other duty than not to wilfully injure him after discovering his peril, and the defendant pleads and relies upon the law of the State of West Virginia as a bar to any recovery herein."

On the trial of the case the appellee, as a part of its evidence, introduced several opinions of the Supreme Court of Appeals of that State supporting the averments of its answer, and also certain statutes of West Virginia, and it was agreed by counsel that these opinions and statutes need not be set out in the record, but should be considered a part of it, and this practice was sufficient to make a part of the record and bring before this court the law of West Virginia. *P. C. C. & St. L. Ry. Co. v. Austin*, 141 Ky., 722; *L. & N. R. R. Co. v. Smith*, 135 Ky., 462; *L. & N. R. R. v. Keiffer*, 132 Ky., 419; *Keiffer v. L. & N. R. R. Co.* 143 Ky., 383; *Collins v. Norfolk & Western Ry. Co.*, 152 Ky., 755.

We think the West Virginia law was sufficiently pleaded and proven, and, as this case is controlled by that law, the judgment is affirmed.

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### Fuson v. Commonwealth.

(Decided January 26, 1915.)

#### Appeal from Whitley Circuit Court.

1. **Criminal Law—Trial—Continuance—Absent Witnesses—Diligence.**—Where in a criminal prosecution an affidavit for continuance on the ground of absent witnesses fails to show that subpoenas for the desired witnesses were placed in the hands of the sheriff for service, such a showing does not establish due diligence on the part of the defendant in securing the absent witnesses, sufficient to entitle him to a continuance.

2. Trial—New Trial—Newly Discovered Evidence.—A new trial will not be granted because of newly discovered evidence, where very little, if any, of the newly discovered evidence relied on is competent, and the facts alleged are not sufficient to show that the evidence could not have been discovered prior to the trial by the exercise of reasonable diligence.
3. Appeal—Transcript—Certificates—When to be Signed.—The practice of signing certificates to be appended to the transcript of evidence before the transcript is prepared or filed is disapproved.

STEPHENS & STEELY for appellant.

JAMES GARNETT, Attorney General, and ROSE & POPE for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Defendant, Lida Fuson, was found guilty of obtaining property by false pretenses, and asks a reversal of the judgment of conviction.

The facts are these:

Prior to the commission of the offense with which he is charged Fuson had executed two notes to James Wynn, one for \$400 and one for \$200. Wynn became ill, and Alice Wynn, his wife, placed the notes in the keeping of her father, William Carpenter. According to the evidence for the Commonwealth, Fuson went to Wynn's home to inquire about the notes. Wynn was unconscious, and Fuson was told that William Carpenter had the notes. Fuson then went to William Carpenter and told him that Alice Wynn, his daughter, had sent him there to get the notes. This statement was false. Carpenter, believing the statement, and relying thereon, delivered the notes to Fuson. At the same time Fuson gave Carpenter a check for \$500, stating that he had that amount of money in the bank on which it was drawn. Fuson claims that the two notes represented borrowed money and that the \$200 note should have been for \$100. He also claims that he had paid Wynn about \$325 on the two notes, and owed only a balance of about \$170. He denies telling Carpenter that Alice Wynn had sent him for the notes. He denies executing a \$500 check, and claims that the check which he actually delivered was for \$170, and that he had sufficient money in bank to pay this note.

Defendant insists that the trial court erred in refusing a continuance. His affidavit shows that he gave to the clerk a few days before the trial a written memoran-

dum containing the names of certain witnesses, with directions to issue subpoenas for them, but he did not know whether they had ever been issued or served. As the affidavit did not show that the requested subpoenas had ever been placed in the hands of the sheriff for service, it is manifest that due diligence was not used by the defendant in securing the attendance of the absent witnesses. Notwithstanding this fact, however, the trial court permitted the affidavit to be read as the deposition of the absent witnesses. Under these circumstances, the defendant cannot complain of the court's refusal to grant a continuance, because the action of the court was more favorable to him than the circumstances warranted.

It is next insisted that the court also erred in refusing to grant a new trial. The affidavit being very long, we deem it unnecessary to copy it in full. It is sufficient to say that very little, if any, newly discovered evidence relied on was competent, and the facts alleged are not sufficient to show that the evidence could not have been discovered prior to the trial by the exercise of reasonable diligence.

As the court did not err in refusing either a continuance or a new trial, and the indictment and instructions are not subject to criticism, and the evidence is sufficient to sustain a conviction, we see no reason for disturbing the judgment.

Before closing this opinion we deem it necessary to discuss a question affecting the transcript of evidence. It appears that the stenographer's certificate appended to the transcript, wherein she certifies that "the foregoing is a complete transcript of the evidence heard on the trial of the case of Commonwealth of Kentucky v. Lida P. Fuson, as appear from my stenographic notes taken on the 7th day of the September term, 1914, of the Whitley Circuit Court, and all the objections, exceptions and avowals made during the trial of said case," is on a separate page from the transcript, and was signed by the stenographer on October 24, 1914. Following the certificate is the certificate of the circuit judge, signed on said date, wherein he certifies that "the foregoing transcript of evidence has been examined, approved and signed by me as the judge before whom the trial was had at the September term, 1914, of the Whitley Circuit Court." It is admitted by counsel, and the facts show, that these two certificates were signed prior

to the time that the transcript was filed, or even prepared. It further appears that this method of certification has long been the practice of that court, and was adopted for the convenience of the court and the parties to the action. Manifestly the very purpose of the certificates is to establish the integrity of the record by showing that the transcript is in fact what it purports to be. Therefore, certificates signed before the transcript is even prepared, though with the expectation that the transcript will thereafter be inserted in a place left for that purpose, utterly fail to accomplish the purpose for which they are required. Though no advantage of the opportunity may be taken, it must be conceded that an opportunity for tampering with the transcript is fully afforded by the practice in question, which necessarily leaves the minds of the members of this court in doubt as to the verity of the record which they are called on to consider. Under the circumstances, therefore, we would be derelict in our duty if we did not express our unqualified condemnation of the method of certification employed in this case.

Judgment affirmed.

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**Bosworth, Auditor v. Metropolitan Life Insurance Company.**

(Decided January 27, 1915.)

**Appeal from Franklin Circuit Court.**

1. **Taxation—Auditor Refunding Money Collected for Taxes—Construction of Section 162, Kentucky Statutes.**—The primary intention of Section 162 of the Kentucky Statutes, authorizing the Auditor of Public Accounts to refund money paid into the treasury for taxes when no such taxes were in fact due, was to authorize the Auditor to refund to officers who collected taxes due the State and paid more into the treasury than was in fact due from them; it was not intended to authorize the Auditor to correct assessments made of the property of the taxpayer and refund the amounts he may determine are due them.
2. **Taxation—Recovery of State of Taxes Paid.**—Taxes paid into the State Treasury can be recovered only in cases wherein it is expressly permitted by Statute.
3. **Taxation—Payment to Auditor of Taxes Not Due—Construction of Section 162, Kentucky Statutes.**—Section 162 of the Kentucky Statutes, which authorizes the Auditor of Public Accounts to issue

his warrant on the treasurer for money paid into the treasury for taxes which were not due, does not authorize the taxpayer who has paid a greater amount of taxes than he really owed, or through mistake, to appear before the Auditor of Public Accounts and require him to take up and pass upon the merits of the claim, and to draw his warrant on the treasurer if it should seem to him the tax had been improperly paid.

JAMES GARNETT, Attorney General, and C. H. MORRIS, Assistant Attorney General, for appellant.

O'REAR & WILLIAMS for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Reversing.

This action was brought by the appellee insurance company under Section 162 of the Kentucky Statutes, to require the Auditor of Public Accounts to issue his warrant on the State Treasurer in favor of appellee for \$385.58, in repayment of taxes which it paid to the State when they were not, in fact, due.

Appellee is a foreign life insurance company, and did business in Kentucky during the period hereinafter mentioned. Under the statute in force from 1903 until 1906 every foreign life insurance company was required to annually pay \$2.00 on each one hundred dollars of all premiums received in cash or otherwise, in this State, or out of the State, on business done in this State, during the year ending the 30th day of June last preceding; and the report of the company showing its business was required to be filed with the Auditor as of July 1st of each year. Kentucky Statutes, Sec. 4226.

In construing the act of 1903, *supra*, in *Mutual Benefit Life Insurance Co. v. Commonwealth*, 128 Ky., 174, this court held that a company was not liable to taxation on the entire premium stipulated for in the policy, but only on the amount actually collected by the company, and that any dividend credited to the policy-holder was merely an overcharge, which was never paid by the policy-holder, and therefore was not received by the company as cash or otherwise, within the meaning of the statute.

The General Assembly of 1906 was in session while the case above mentioned was pending in the Court of Appeals, and, upon its attention being called to the statute as above construed, it amended the act of 1903

by re-enacting the major part of what was then Section 4226 of the Kentucky Statutes; and after requiring the report of the insurance company to be made to the Auditor on the 1st day of January in each year, showing the premiums collected in or out of the State, on business done in the State for the year ending December 31st, it added a new provision, which was not in any of the preceding statutes, to the effect that, for the purposes of taxation, no deduction should be made for dividends allowed to policy-holders in fixing the amount of premiums received by the company. Acts 1906, p. 208; Kentucky Statutes, 1909, Section 4226.

In a case brought for the purpose of testing the act of 1906 this court decided that it precluded the defendant from deducting from its report dividends of any sort or character. *Northwestern Mutual Life Ins. Co. v. James, Auditor*, 138 Ky., 48.

The result was, that under the statute of 1903, and until the amendment of 1906, foreign life insurance companies were not required to report or pay taxes on so much of the premiums upon policies as represented dividends and bonuses credited to policy-holders upon their premiums.

Under the act of 1903, the report of the year's business was made as of June 30th of each year; but the law of 1906 required the companies to report the preceding year's business on January 1st of each year. The act of 1906 became effective on June 11th, 1906; and the question was presented whether a report should be made on June 30th, 1906, as was required by the act of 1903, or should it be deferred to January 1st, 1907, as required by the act of 1906. And, as the act of 1906 required the report to be made on January 1st, 1907, of its business for 1906, a report made under the act of 1906 would leave the period extending from July 1st, 1905, to January 1st, 1906, unreported, unless the report to be made on January 1st, 1907, embraced the preceding eighteen months' business.

Following its usual course of business, appellee made a report as of June 30th, 1906, for the year ending that day, showing the premiums received by appellee in Kentucky for the year ending June 30th, 1906, amounted to \$1,146,555.78, in which there was included dividends credited upon premiums to the amount of \$19,279.23. It



paid the \$2.00 a hundred tax on \$1,146,555.78 on July 1st., 1906, by its check of that date, to the Insurance Commissioner, for \$22,931.12; the tax upon this \$19,279.23 of dividends amounting to \$385.58.

This question arises: Was the appellee assessable under the statute of 1903, or under the statute of 1906? If it was required to make its report as of June 30th, 1906, and to pay its tax within thirty days thereafter, it was assessable under the statute of 1903; and if assessable under that statute, it was not required to include in its report of Kentucky premiums the credits therein allowed for dividends. Appellee contends that the act of 1906 was intended to have a prospective effect only, and that this is shown by the fact that if the insurance companies were not required to make their reports on June 30th, 1906, the State would be deprived of a very considerable item of revenue for the fiscal year which ended on that date.

The circuit court took that view of the case, and gave appellee the relief prayed for. From that judgment the Commonwealth prosecutes this appeal, and for a reversal insists: (1) that under the statute the court should have sustained its demurrer to the petition; and (2) this tax having been voluntarily paid into the State Treasury, there can be no recovery in any event.

As heretofore stated, this action is brought under Section 162 of the Kentucky Statutes, which reads as follows:

“When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.”

This statute has several times been construed by this court; notably in *German Security Bank v. Coulter*, Auditor, 112 Ky., 579, where we reviewed the former ruling of the court in *Bank v. Stone*, 108 Ky., 427.

In the *Coulter* case the bank asked a mandamus to compel the Auditor to issue his warrant to the bank for

an excessive payment of taxes to the Commonwealth, which resulted from an admitted excessive assessment. It was conceded the excessive part of the taxes was not due the State; but, in speaking of its recovery under the Section 162, *supra*, the court said:

"The balance of the claim asserted in this action does not come within the provisions of the statute, as will be hereinafter shown. This is not an action against the State. If it was, it could not be maintained, because the State has not, by the statute quoted, or any other statute, given consent to be sued. The primary intention of the statute was to authorize the Auditor to refund to officers who collected taxes due the State, and paid more into the treasury than was in fact due from them. It was not intended to authorize the Auditor to correct assessments made of the property of taxpayers, and refund the amounts he may determine are due them; for the statutes clearly provide whose duty it is to make assessments of property, how they may be corrected, and the time in which it may be done. The Auditor is not the official upon whom the law confers such authority. \* \* \*

"This is a mandamus proceeding to compel the Auditor of Public Accounts to issue his warrant for the sum alleged to be due the appellant for an excessive payment of the taxes which resulted from excessive assessment. It is not an action to recover all the taxes paid, but the difference between the amount collected and the amount which it claimed should have been collected on a correct assessment. This action cannot be maintained."

Likewise, in the case at bar, appellee is seeking to recover only the excess it paid upon the tax bill made out against it by the Insurance Commissioner, and based upon the report made by the appellee.

Again, in *Couty v. Bosworth*, Auditor, 160 Ky., 313, the appellant paid, after suit by the Auditor's Agent, the State tax of \$580.15 upon 100 shares of the capital stock of the American Tobacco Company, which were not due because the company had paid the tax; and by mandamus proceedings Couty sought to require the Auditor to draw his warrant, by way of reimbursement, in precisely the same manner followed in the case at bar.

Referring to the language above quoted from *German Security Bank v. Coulter*, Auditor, the court said:

"This seems to us to be a sound principle. We do not believe that the Legislature ever intended to enact a law that would permit any person who thought he had been required to pay a greater amount of taxes than he thought to be due, or to pay taxes on property that he considered exempt, or even to pay taxes to the sheriff or collecting officer of a county, through mistake, to appear before the Auditor of Public Accounts and require him to take up and pass upon the merits of the claim; and then, if it appeared to him that the tax had been improperly paid, to draw his warrant on the Treasurer for the amount appearing to him to be due the claimant."

In the Coulter case, *supra*, the court reiterated the familiar rule that taxes voluntarily paid could not be recovered; and that the rule was otherwise only when the payment of the tax could be coerced by summary levy and sale of property by the collecting officer. In the case at bar the tax against appellant was recoverable by action. Kentucky Statutes, Sec. 4233.

But in the Couty case, *supra*, the tax had been recovered and paid in a suit by the Auditor's Agent; and, although they were not due, and therefore improperly collected, a recovery was denied under the statute. There can be no action against the State to recover taxes which have been paid into the treasury unless it be authorized by statute; and such an action can be maintained only upon the terms prescribed by the statute.

In the case at bar appellee not only paid the excessive portion of the tax, but, if the law of 1906 was in force when it was paid, appellee would have owed no tax for the last half of the year 1905, since the act of 1906 required the report to be made as of January 1, 1907, for the preceding year 1906. It is not to be presumed that the Legislature intended to exempt the appellee from taxation for this six months.

The Couty case was a much stronger case for the taxpayer than the present case, in that Couty was forced to pay his invalid tax by suit; nevertheless, he was denied a recovery. It is controlling authority against appellee's right to recover in this case.

Appellee paid this excessive tax in July, 1906; it did not make a demand for its repayment until March, 1908, and waited until April, 1912, before it instituted

this action to recover it. In the meantime the State had long since used the money for governmental purposes. These facts emphasize the wisdom of the rule and the interpretation given the statute in the Coulter case and in the Couty case. An affirmance of the judgment in this case would amount to a reversal of those cases; and that, we are unwilling to do.

Judgment reversed and action remanded with instructions to dismiss the petition.

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### **Brannon v. Commonwealth.**

(Decided January 27, 1915.)

#### **Appeal from Bourbon Circuit Court.**

1. Contempt—What Will Constitute.—Such acts or conduct as will amount to disrespect of or indignity to the judge or court, or interference with or disobedience of the processes, orders or judgment of a court, or some obstruction of the due and proper administration of justice in a pending case, or some misconduct of an officer of a court, will constitute contempt of court.
2. Contempt—Assault and Battery Upon a Witness—When a Contempt of Court.—If a defendant criminally prosecuted, commits an assault and battery upon a witness for the Commonwealth, either as a punishment for having testified against him under an indictment then pending, or to prevent his testifying against him in a future trial under an indictment then pending, such assault and battery will constitute a contempt of court, for which the court in which the indictments were pending has the power to proceed against him by rule and summarily try and punish him. And if, in the judgment of the court, its power as such is inadequate to the infliction of such punishment as the contempt deserves, it has the right to submit the matter to the determination of a jury.
3. Trial—Pending Case—What Is.—The return of a verdict finding the defendant in an indictment guilty and fixing his punishment, does not terminate the case, nor does the entering of a judgment upon the verdict finally dispose of the case; the indictment is still pending until the expiration of the time given the defendant for filing a motion and grounds for a new trial, which, in a criminal case, may be done at any time before the ending of the term.
4. Contempt—Punishment—When Not Excessive.—Evidence examined and held sufficient to show that the punishment, consisting

of a \$1,000.00 fine and six months' imprisonment in jail, inflicted by the verdict in this case, is not excessive.

DENIS DUNDON, JOHN S. WILLIAMS and HAZELRIGG & HAZELRIGG for appellant.

JAMES GARNETT, Attorney General, and ROBERT T. CALDWELL, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, T. F. Brannon, under a rule from the Bourbon Circuit Court, was tried by a jury and convicted of criminal contempt, his punishment being fixed by the verdict of the jury and judgment of the court at a fine of \$1,000.00 and six months' imprisonment in the county jail. Following the return of the verdict appellant filed motion and grounds for a new trial, the grounds being: (1) The acts proved did not constitute a contempt of court; (2) the court erred in instructing the jury; (3) the punishment was so excessive as to show that the jury were actuated by passion or prejudice in fixing it. The motion for a new trial was overruled. Thereafter, at the same term of the court, the appellant filed his own and other affidavits and moved the court to set aside the order overruling the motion for a new trial, and renewed the motion for a new trial, both of which motions the court overruled, to which ruling the appellant excepted. The latter, being dissatisfied with the judgment of conviction and the several rulings of the court referred to, has appealed.

The ruling of the court as to the supplemental motion for a new trial will first be disposed of. The affidavits filed in support of this motion stated, in substance, that one of the jurors had previous to the trial said in their presence, "that he believed that the defendant should be given the limit." The juror by affidavit denied making the statement, or that he entertained prejudice toward appellant, admitting, however, that he had inquired of a former Commonwealth's attorney what punishment could be inflicted for criminal contempt and was told by the latter that it was unlimited. It also appears from his affidavit that this admission, with the further statement that he had not made up his mind as to the guilt or innocence of appellant, was made by him when taken upon the jury, and that on appellant's trial he unavailingly exerted his influence with other members

of the jury to reduce the punishment below that fixed by the verdict.

It is, however, insisted for appellant that so much of the juror's affidavit as related to his efforts to reduce the punishment inflicted by the verdict was incompetent, but we do not so regard it. The competency of such evidence was considered by us in *Gleason v. Commonwealth*, 145 Ky., 128. In the opinion it is said:

"By the affidavits of three persons filed in support of this ground (disqualification of a juror) it was stated that J. M. Morris, a member of the jury by which appellant was tried, expressed before the trial and before he was accepted as a juror the opinion that appellant was 'guilty of the murder of George Courtney and should be punished therefor by being hanged or sent to the penitentiary for life.' Morris gave an affidavit denying that he formed or expressed any opinion as to appellant's guilt or innocence before the trial. In addition, there were filed the affidavits of several members of the jury from which it appeared that Morris, at no time during the trial, manifested any bias or prejudice against appellant, but that, on the contrary, he was largely instrumental in influencing several of the jury, who were in favor of finding appellant guilty of murder and punishing him accordingly, to agree to a verdict of voluntary manslaughter. We are of opinion that the affidavits of the other jurors were properly admitted as evidence on the charge of bias against Morris. The affidavit or oral testimony of a juror will not be received to impeach a verdict or to impeach a fellow juror's conduct, but will be admitted in support of a verdict attempted to be impeached by other testimony, whether the juror's testimony goes to deny or explain misconduct during retirement. We are aware that this doctrine does not meet with favor in some of the States, but we gave it our approval in *Howard v. Commonwealth*, 24 R., 612, and have since adhered to it. In elaboration of this doctrine Mr. Wigmore, in his valuable work on Evidence (Vol. 4, Sec. 2354, Sub-sec. 4), says: 'Moreover, this object of disproving bias alleged to have existed before trial may be attained by showing expressions and conduct during retirement as an evidential fact relating back and negating the supposed prior bias. But where the object is to determine the grounds or motives of the verdict as in themselves important for sustaining it

(for example to show that a certain illegal paper or erroneous charge did not influence the verdict), here the other principle (ante, Sec. 2349) applies to forbid this. The distinction is that in the former case the juror's expressions are not considered in their aspect in establishing motives for the verdict, but merely as part of his whole conduct going to determine the question of his former bias.' 11 Am. & Eng. Ency. of Law, 1008."

If the conduct of the juror in attempting to influence the jury to inflict a lighter punishment than was awarded by the verdict, could properly have been shown by the affidavit of other members of the jury, as held by the authorities, *supra*, it was clearly competent to show it, as was done in this case, by the affidavit of the juror himself. Under the circumstances it was necessary for the trial court to determine whether the juror alleged to be biased was disqualified to such an extent as to impeach the verdict and give cause for setting it aside. The matter was one that addressed itself to the discretion of the court. Some weight must be given to the court's knowledge of the conduct of the juror during the trial and its acquaintance with the character of the juror and those of the three personal friends of appellant by whose affidavits his disqualification for service upon the jury was attempted to be shown, and the fact that the court accepted the statements contained in the juror's affidavit in preference to those contained in the affidavits of the three witnesses of appellant, gives us no ground for holding that the ruling of the court on this point against appellant was error. In other words, we are unconvinced by anything appearing in the record that the ruling of the court in refusing to set aside the previous order overruling the motion for a new trial was an abuse of discretion or prejudicial to the rights of appellant. *McKee v. C. F. & S. R. Co.*, 161 Ky., 711.

Appellant's main contention, that the acts for which he was convicted did not constitute contempt, cannot prevail. To intelligently pass upon this contention consideration of the evidence will be necessary. It appears that there were three indictments returned in the Bourbon Circuit Court against appellant, who was the keeper of a saloon, each charging him with an unlawful sale of liquor. C. P. Cook was an important witness for the Commonwealth in each of the three cases referred to. Two of the cases had been tried, one of the trials

resulting in appellant's acquittal and the other in his conviction, Cook being the principal witness against him in each of the cases. The third case was continued. The following excerpts from the testimony of Cook in the instant case will indicate the acts constituting the alleged contempt:

"Q. This rule charges Mr. Brannon with contempt of court for striking you after you had left the court room here. Just tell what those facts were, if he struck you, Mr. Cook How it came up, and how long after the trial of this case was it? A. A very few minutes. I walked up street before the jury had brought in a verdict. After I testified I walked up street, and I stopped on the corner of Seventh and Main to talk to Mrs. Sims Wilson. She stopped me and asked me about a certain matter, I have forgotten what it was now, perhaps an order, and just as I started to walk on to get on the other side of the street, Seventh street, going up, Mr. Brannon came diagonally across the street. I turned and saw him, he was almost to me, and he says, 'God damn you, I ought to whip you, and I am going to do it.' And with that he struck me on the jaw here, and then he struck me here, and knocked me down and kicked me twice. Q. Where did he kick you? A. Kicked me in the back. \* \* \* As soon as I got up, he shook his fist in my face and says, 'God damn you, I am going to give you this every time that I meet you.' \* \* \* When he first struck me he said, 'You God damned s— of a b——, I ought to whip you, and I'm going to do it.' Q. What did you do? A. Nothing whatever. And said nothing. \* \* \* Q. Did you or not have an opportunity to defend yourself before he struck you? A. No, sir; he struck me just as he said; he says, 'You God damned s— of a b——, I ought to whip you, and I'm going to,' and with that he struck me."

With respect to this transaction appellant testified as follows:

"Q. Now, tell just how you met Mr. Cook there at the corner of Seventh and Main streets, and what was said between you there, and what was done? A. Well, I was going up on the west side of Main street, from the court here. When I left the courthouse I went up Main street on the west side until I got to Seventh street. My place is on the opposite side of the street, and I was crossing over and I met—I never saw Mr. Cook until I



run right into him between Seventh street—between the two corners. Q. You mean on the north side or the south side of Seventh street? A. Yes, sir. Right in the middle of the crossing. I said to him, 'You dirty little cur, you lied. You know you lied.' And he called me another liar, and as he did I hit him. I never hit him but once. I hit him the first time this way; then I hit him with the left hand the second time, and that was all that I done. Q. Did you knock him down? A. Yes, sir. He fell on his back. Q. Did you kick him at all? A. I did not, sir. \* \* \* Q. What else did you say to him there at the time? Did you say that you were going to whip him every time you saw him? A. I don't think I did."

Appellant also testified, in substance, that he did not threaten Cook with any violence, that he had no purpose of intimidating him from testifying in the remaining case pending against him, and that he intended no contempt of the court. On cross-examination he was asked:

"Q. You say that you didn't strike Mr. Cook for the purpose of intimidating him from giving any further testimony. It is a fact that you did strike him for having testified? A. No, sir; never. Q. What did you strike him for? A. Just because he told a lie. That's it. Q. Then you did strike him for the purpose of punishing him for having testified against you, if you struck him for having told a lie, didn't you? A. I thought it was all over and everything settled, and I had no idea of doing anything to wrong this court."

Cook's testimony was corroborated in the main by three eye-witnesses of the assault, one of whom heard appellant use the insulting and abusive epithets and language applied to Cook and saw him knock him down and kick him. The others were not close enough to hear what was said, but they saw Cook knocked down and kicked by appellant, and all three witnesses testified that the assault was unprovoked by anything that Cook did, and that he made no effort to defend himself against the attack.

It should here be remarked that at the time the assault and battery was committed by appellant upon Cook there was still pending one of the indictments against the former under which he had not been tried, and that Cook's name appeared on this indictment as a

witness; and it was known to appellant that he would, upon the trial of the case at the next term, be called on to again testify as a witness in behalf of the Commonwealth against him. Appellant's trial under one of the other indictments had, as previously stated, resulted in a verdict in his behalf, but the trial of the case in which he was convicted had, according to his testimony, been concluded but a few minutes before he committed the assault and battery upon Cook. According to Cook's testimony, the attack upon him occurred very soon after he had left the courthouse for his place of business, and that at the time of his leaving the courthouse the jury which convicted appellant had not returned a verdict. It is true the case in which appellant was convicted of unlawfully selling liquor had, at the time of the assault, been tried, but it had not been finally disposed of, for the judgment had not then been entered upon the verdict; and, as, under Section 273, Criminal Code, appellant had the right to make application for a new trial at any time during the term, which continued for some days thereafter, the case cannot be said to have been finally disposed of until the time allowed by the Code for filing motion and grounds for a new trial expired, which ended with the close of the term.

So it is apparent that at the time of the assault upon Cook by appellant there were two cases pending against him in the Bourbon Circuit Court, one of which had been disposed of only in part, and the other continued for trial at the succeeding term, in which Cook was an important witness for the Commonwealth; and it is manifest from what he said to Cook at the time of assaulting and knocking him down and kicking him, and his threat to repeat it at all future meetings between them, that the purpose of the attack upon the latter was not only to punish him for previously testifying against appellant in the two cases which had been tried, and one of which had not been finally disposed of, but also to intimidate him with a view of influencing his testimony, or of preventing his giving it, on any future trial that might take place under the indictment which had been continued.

There appears to be no authority in this jurisdiction other than *Melton v. Commonwealth*, 160 Ky., 642, as to what constitutes the pendency or non-pendency of an action or proceeding, with respect to which a con-

tempt was charged to have been committed, but the question seems to have been decided in other jurisdictions, a leading case on the subject being that of *State of Washington v. Tugwell*, 19 Wash., 238, 43 L. R. A., 717. In that case the respondent was accused of publishing a libelous article six days after the reversal of a judgment by the Supreme Court of the State of Washington, which attacked the court because of the reversal. It appeared, however, that the publication, though occurring after the reversal, was made before the court had acted upon a petition for a modification of the opinion, final judgment upon which was not rendered until March 2, 1898, the remittitur issuing March 9, 1898. In rejecting the respondent's contention in the contempt proceedings, that the case, with respect to which the contempt was charged to have been committed, was not pending on appeal at the time the article was written, the court said:

"The first opinion in the case was followed by a petition for rehearing on the part of the appellant. Leave to print and file additional briefs was granted by the court, and the case assigned regularly, and reargued orally in the court, and the opinion of the majority of the court then filed, reversing the judgment of the superior court. A petition was then filed by counsel for respondent, praying for an important modification of the opinion filed, and subsequently an opinion denying such modification. There can be no doubt of the jurisdiction of this court over the cause and the power to make any modification of its opinion, until the final judgment was rendered, and until the remittitur issued. Under the law the courts in this State are always in session, in legal contemplation. 'An action is "pending" \* \* \* until the judgment is fully certified.' *Anderson*, Law Dict. verb. Pend. *Ulshafer v. Stewart*, 71 Pa., 170; *Holland v. Fox*, 3 El. & Bl., 977; *Wegman v. Childs*, 41 N. Y., 159; \* \* \*

In the elaborate notes appended to the case, *supra*, will be found the following statements of the rule in question, supported by abundant authority:

"Where a decree has not been enrolled, or where it is subject to modification upon motion, or where the court might grant a rehearing, or where an appeal might be taken, or where the costs had not been taxed, or where no execution had issued—it not being in con-

dition to issue execution—the case could not be said to have reached that stage where it could be said it was not pending in that court. *Re Chadwick*, 109 Mich., 588; *Fishback v. State*, 131 Ind., 304; *Bloom v. People*, 23 Col., 416.

“A petition on which judgment has been finally pronounced, but on which the order has not been drawn up, is a ‘pending proceeding.’ *Exparte Turner*, 3 Mont., 523.”

In *Melton v. Commonwealth*, *supra*, Melton, a physician, in contemplation of a suit to be instituted by a party to recover damages for personal injuries sustained by the alleged negligence of another, pretended to treat the party in a professional way for the purpose of manufacturing evidence that would sustain the action that was soon thereafter brought, when he knew such party was not injured. We held that, although such conduct upon his part was a common law misdemeanor, because of its obstructing justice, for which he might have been proceeded against by warrant or indictment, he was not guilty of contempt, because the action in which he attempted to manufacture evidence was not an action pending in court. After defining the distinction between acts which constitute the common law misdemeanor of obstructing justice and those which constitute criminal contempt, it is in the opinion said:

“In thus speaking we do not undervalue the importance of protecting courts or of keeping pure the administration of the law; nor do we think what we have said limits in any manner the power courts have always possessed to punish as for contempt persons who were guilty of contempt as it has been always defined. When a court has full power and authority to protect its dignity, enforce its processes, discipline its officers and punish those who would impede or bring into disrepute the administration of justice in a pending case, it has all the authority that is needed to be exercised through contempt proceedings, and other offenses should be left to be disposed of in the ordinary way. If there had been a suit pending in the Jefferson Circuit Court and Melton had attempted to manufacture evidence in this suit, or had endeavored to persuade a witness to give false evidence or conceal the truth, *or had in any manner or form interfered with the due administration of justice in the court in which the case was pending, we would*

*have no doubt of the right of the court in which the case was pending to proceed against him in the summary manner adopted by Judge Field in this case."*

For one to commit, as was done by the appellant in this case, an assault and battery upon the witness as a punishment for giving testimony against him in an action or criminal prosecution then pending, though in part disposed of, or as a means to intimidate him and influence his testimony expected to be given in the future trial of an action or criminal prosecution then pending, is a criminal contempt, because such conduct is as much an interference with the authority and dignity of the court, and an obstruction of justice, as would be the intimidation or bribery of a witness, or any contempt committed in the presence of the court. The evidence clearly proves appellant's guilt of such a contempt, and this being true it was within the power and jurisdiction of the court to proceed against him by rule and summarily try him as was done in this case. It is equally manifest that the power of the court was inadequate to the infliction of such punishment as the contempt of appellant deserved. Therefore, it was proper to submit the matter to the determination of a jury. As said in *French v. Commonwealth*, 30 R., 98:

"We have in this State no statute defining contempt. There is a statute limiting the power of the court as to the infliction of punishment for contempt, but if, in the opinion of the court, the contempt is one demanding greater punishment than lies in its power to inflict, it may have a jury to hear the truth of the matter, and leave it to them to inflict such punishment as they may deem commensurate with the offense. As in any other case of trial by jury, their verdict will not be disturbed unless flagrantly against the evidence or the result of passion or prejudice. There is nothing here to indicate passion or prejudice on the part of the jury."

The further contention of appellant that the court erred in instructing the jury is without merit. Instruction No. 1 appears to be the only one objected to. That instruction, in substance, told the jury that in order to find the appellant guilty of the contempt charged they must believe from the evidence beyond a reasonable doubt that the assault and battery committed upon Cook was done to intimidate him as a witness in the case then pending, or to punish him for testifying in the case

theretofore recently tried. It is insisted for appellant that the alleged error in this instruction was in its advising the jury that they might find appellant guilty if his motive for committing the assault and battery was to punish Cook for testifying in the case just tried. Obviously this contention rests upon the ground that if the assault was committed from the motive last mentioned it would not constitute a contempt in the meaning of the law. This we have already answered by stating in the opinion that as the case tried must be regarded as pending in court at the time of the commission of the assault, the assault, if committed by way of punishment for the testimony given by Cook therein, was as much a contempt as if it had been committed for the purpose of intimidating Cook as a witness in a future trial to be had of the other indictment, which had been continued to the succeeding term of the court.

It is also insisted for appellant that he did not actually know that Cook had been subpoenaed as a witness in the continued case. In our opinion it is not material whether appellant had knowledge of a subpoena having been served on Cook in that case. It is manifest that he knew Cook was a prospective witness in the continued case, as his name appears upon the indictment as a witness for the Commonwealth, and appellant, being in court on that indictment, must be presumed to have knowledge of what it contained, not only as to the offense charged, but as to the witnesses for the Commonwealth whose names appear upon the back thereof. Moreover, as Cook was the most important witness for the Commonwealth in the other two cases and had testified in each, which was, of course, known to the appellant, who was himself present at each of the trials, it is reasonably certain that he knew of the importance of his testimony to the Commonwealth in the continued case.

Appellant's final contention, that the punishment inflicted by the verdict is excessive, cannot be sustained. In view of the nature of the contempt committed by appellant and the aggravating circumstances attending its commission, no reason is apparent for regarding the punishment inflicted by the jury greater than his conduct deserved. In *French v. Commonwealth*, *supra*, the judgment inflicting a fine of \$5,000.00 upon the appellant was affirmed by this court. We find in this case nothing to

indicate that the jury in reaching a verdict were influenced by passion or prejudice, and, in the absence of such a showing, no reason is apparent for disturbing the verdict. Every judge at all familiar with the conduct of criminal prosecutions in this State has seen that one of the chief difficulties in the way of the punishment of crime and the enforcement of law, lies in the inability of the courts and prosecuting officers to procure the testimony of witnesses having knowledge of the facts upon which the conviction of violators of the law may be secured. This in most instances is due to the intimidation or bribery of witnesses. It is, therefore, the duty of the court to protect witnesses from evilly disposed persons who resort to such means of suppressing evidence; and this cannot better be done than by bringing them to speedy trial and certain punishment; and where, as in a case like this, the evidence unerringly establishes the guilt of the contemner and there is nothing to be urged in mitigation of the contempt, it would be a miscarriage of justice to set aside the verdict unless for error so prejudicial in character as that it prevented the accused from receiving a fair and impartial trial.

The judgment is affirmed.

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### **Commonwealth v. Gold & Stock Telegraph Company, etc.**

(Decided January 27, 1915.)

#### **Appeal from Jefferson Circuit Court (Chancery Branch, First Division).**

**Taxation—Action by Revenue Agent to Recover Taxes on Omitted Assessment.**—In view of the ruling of this court in *Commonwealth, by etc. v. Ewald Iron Co.*, 153 Ky., 116, that of the circuit court in dismissing, at the cost of the revenue agent, this action brought by him to recover taxes on property claimed to have been omitted from assessment, was error.

**MATT J. HOLT** and **A. SCOTT BULLITT** for appellant.

**RICHARDS & HARRIS**, **GEORGE H. FEARONS** and **FRANCIS N. WHITNEY** for appellees.

**OPINION OF THE COURT BY JUDGE SETTLE—Reversing.**

This appeal from a judgment of the Jefferson Circuit court, chancery branch, first division, which dismissed, without prejudice and at the cost of the relator, this action brought by the latter in the name of the Commonwealth against appellees for the recovery of taxes on property alleged to have been omitted from assessment, is a companion case to those of Commonwealth of Kentucky, by etc., v. Standard Oil Co., 162 Ky., 149, and Commonwealth of Kentucky, by etc., v. Intersouthern Life Ins. Co., etc., 162 Ky., 228, and is controlled by the opinions therein. It was held by the circuit court in this case, as in those, that the dismissal of the action at the cost of the revenue agent, was authorized by Chapter 15, Article 2, Section 5, page 396, Acts of 1912, because of the failure of the revenue agent to prosecute it with due diligence.

In view of the construction given the act, *supra*, in Commonwealth v. Ewald Iron Co., 150 Ky., 116, we must hold in this case, as was done in Commonwealth of Kentucky, by etc., v. Standard Oil Co., and Commonwealth of Kentucky, by etc., v. Intersouthern Life Ins. Co., *supra*, that the judgment appealed from is erroneous.

For the reasons indicated the judgment is reversed and cause remanded for proceedings in conformity with the opinion in the Ewald case.

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### Janes v. Commonwealth

(Decided January 27, 1915.)

#### Appeal from Nelson Circuit Court.

1. Criminal Law—Larceny—Instructions.—On a charge of grand larceny evidence by the prosecuting witness that the defendant had taken from his pocket bills amounting, in his judgment, to at least \$45.00, when taken in connection with positive testimony that he had previously on that day placed in that pocket bills and other money aggregating \$55.00 or \$60.00 and had expended only a small part of it, and that afterwards there was only \$2.80 in his pocket, authorized the jury to find that defendant had taken therefrom more than \$20.00.
2. Criminal Law—Larceny—Instructions.—An instruction telling the jury that although they might believe the defendant took the money, yet if they further believed that at the time he was so drunk that he did not have any felonious intention to commit larceny, they would find him not guilty of a felony but would find



him guilty of a trespass and fix his punishment at a fine, was not prejudicial to the appellant where the jury found him guilty of a felony, although the latter part of the instruction may have been erroneous.

3. Argument of Counsel—Larceny—Drunkenness.—Argument by the attorneys for the Commonwealth criticising the defense that defendant was so drunk that he could have had no intention of committing larceny, coupled with the explanation from the attorneys that they were not criticising the court's instructions or the law as presented therein, but were merely criticising the defense offered in this case, was nothing more than legitimate argument.

NAT W. HALSTEAD and OSSO W. STANLEY for appellant.

JAMES GARNETT, Attorney General, and ROBERT T. CALDWELL, Assistant Attorney General, for appellee.

#### OPINION OF THE COURT BY JUDGE TURNER—Affirming.

Appellant was indicted in the Nelson Circuit Court charged with grand larceny, and upon his trial was found guilty and sentenced to confinement in the penitentiary from one to five years, and from that judgment he prosecutes this appeal.

The evidence for the Commonwealth shows that in September, 1913, Sylvester Metcalf, a farmer living about five miles from Bardstown, came to that town, and having sold a cow for \$45.00, and having collected other sums of money amounting to \$10.00 or \$15.00, placed the same, consisting of bills and silver, in the outside lower left hand pocket of his coat. He proceeded to drink heavily, going from one saloon to another, and doing a good deal of treating. Finally, about the middle of the afternoon, he met appellant in a saloon and they continued to indulge, the evidence showing that appellant also had been drinking heavily throughout the day. They remained together the rest of the afternoon until quite late, when Metcalf's 12-year-old son came to town in a buggy to take him home. It appears that while the two were together during the afternoon that Metcalf, upon more than one occasion, exhibited the money which he had in his outside pocket. When Metcalf and his son finally started home appellant concluded that he would like to go out in that neighborhood with them where he had a relative. He was invited by Metcalf to go and got in the buggy on the side of Metcalf next to the pocket where he had the money, and the boy sat in Met-

calf's lap and did the driving. When they were about three miles from town Metcalf claims that he found appellant's hand in his left outside coat pocket, where the money was, and grabbed hold of it with his own hand and demanded that appellant give back his money, which he then claimed amounted to \$45 or \$50 in bills; appellant changed the money from the hand next to appellant into his other hand, and then using the hand so relieved of the money he grabbed the reins from the boy's hand and stopped, or almost stopped, the horse, jumped out and started back to Bardstown. Metcalf drove to the home of a neighbor, telephoned the sheriff, who met appellant in the outskirts of Bardstown, arrested him and found concealed in his sock \$35.00 in bills. Metcalf when he reached the home of his neighbor for the purpose of telephoning the sheriff had only \$2.80 left in his pocket.

The first question made is that the court erred in instructing the jury on the charge of grand larceny because there was no evidence that the amount of money stolen, if any, was more than \$20.00. The evidence of Metcalf is that during the day he had in that pocket something like \$55 or \$60 in all, and that he had spent some portion of it, the exact amount he could not tell, but, to the best of his judgment, it was at least \$45 that appellant took out of his pocket. This opinion of the witness, taken in connection with the positive testimony that he had that day cashed a check for \$45 and had collected from various persons smaller sums aggregating \$10 or \$15, and placed the same in that pocket, certainly authorized the jury to find that appellant had taken more than \$20.00.

There was a good deal of evidence to the effect that appellant had been very drunk all of that day, and he himself testified that he had no recollection of being in the buggy with Metcalf or of anything which Metcalf said occurred, and that the first thing he remembered since early that afternoon was when he awoke in jail that night. Under this state of case, it is urged that it was error for the lower court to refuse an instruction which appellant offered to the effect that, although the jury might believe that he took the money from Metcalfe, yet, if they further believed that at the time he took it he was so drunk that he did not have the felonious intention of committing larceny, they would find him

not guilty. While the court declined to give this instruction, it gave one embracing this idea, and further instructed the jury that if they so believed they would only find appellant guilty of trespass and fix his punishment at a fine. Whether the latter part of that instruction was correct or not need not be passed upon or inquired into, for the jury having found appellant guilty of a felony, it could not have been prejudicial to appellant to have authorized his conviction for trespass if the jury believed he was at the time so drunk as to have been incapable of having an intention to commit larceny. Under that instruction, if the jury had believed appellant was as drunk as he claimed, it could not have found him guilty of a felony.

It is also urged as ground for reversal that the county attorney and Commonwealth's attorney were guilty of improper argument in the trial of the case.

The county attorney said in substance, referring to the defense of drunkenness, that it was a new patent and that he had never heard of it being used in a case like this before; that a man ought not to be excused from crime because he came to town and got drunk, and at this point the counsel for appellant objected, and the county attorney disavowed any intention of criticising the law, whereupon the court sustained the objection made by appellant's counsel and told the jury that the law as given in the instructions was the whole law of the case; then the county attorney continued his remarks, saying, in substance, that the law referred to criminal intention, and that a man who has lost his sense of right and wrong is not accountable for his acts; in other words, it is insanity. The Commonwealth's attorney also followed this general line of argument in a somewhat different way, and expressly stated he was not criticising the law as given in the instruction but was criticising the defense in this case.

Treating these arguments as a criticism of the defense in this case, and not as a reflection upon the court's instructions, we fail to see how it was anything more than legitimate argument.

We have carefully examined the record and find no error prejudicial to the substantial rights of appellant, and the judgment is affirmed.

**Burton Construction Company v. Metcalfe.**

(Decided January 27, 1915.)

**Appeal from Estill Circuit Court.**

1. Master and Servant—Negligence.—A master is not responsible for injuries to an employee caused by the ordinary negligence of a superior employee, but is responsible for such injuries to a subordinate caused by the gross negligence of a superior.
2. Master and Servant—Negligence—Exemplary Damages.—The servant can not recover exemplary damages against a master for an injury caused by even the gross negligence of a superior employee, but may recover compensatory damages on account of injuries resulting from gross negligence of a superior employee.
3. Master and Servant—Negligence.—The master is not responsible for injuries resulting to a servant, and which were caused by the negligence, either ordinary or gross, of a fellow servant in the same class with himself, and engaged in the same field of labor.
4. Master and Servant—Damages—Negligence.—An act done by a servant in the immediate presence of a superior, and by the command of a superior, is the act of the superior, and the master is responsible for the damages resulting from such act, if it be an act of gross negligence on the part of the superior employee.
5. Master and Servant—Assumption of Risk.—While a servant in engaging in work for a master assumes all the risks and dangers incidental to the work in which he is engaged, he does not assume the hazards and dangers resulting from the negligence of the master, or the gross negligence of his superior servant in authority, in the conduct of the work.
6. Master and Servant—Assumed Risk.—The doctrine of assumed risk arises out of the contractual relations between the master and servant, and it can not be presumed that the servant contracts to risk the hazards and dangers to himself, arising from the gross negligence of a superior, or the negligence of the master.

ROBERT R. FRIEND and RIDDLE & FRIEND for appellant.

CLARENCE MILLER, SCOTT & HAMILTON and R. W. SMITH for appellee.

**OPINION OF THE COURT BY JUDGE HURT—Reversing.**

On the 15th day of July, 1912, John Metcalfe and a number of other persons, as employees of the Burton Construction Company, were engaged in knapping rock. This we understand to be the process of reducing rocks into very small pieces by the use of a small hammer upon them. The appellee and those associated with him performed this labor upon a flat piece of ground at the mouth of a hollow, at the foot of a hill. While engaged

in this work it was necessary for the appellee and his associates to sit down upon the ground, or upon some very low object, so as to bring them in such proximity to the rocks as to be able to break them into small pieces. The rocks, in large pieces, were hauled by other employes and laid upon the hill side, from nine to twelve feet from the base of the hill, where the men were engaged in the knapping process. On the day stated above, and previous thereto, the appellee and those engaged in the work with him, when they needed material to work upon, would go up to the rock pile upon the hill above them and bring down the rock in their arms to the knapping ground. John Wilkerson was the foreman for the appellant, and was present, directing the work, and had control and charge of the appellee and those associated with him in relation to the work in hand. He directed Jesse Tipton, another employee of the appellant, to take a large sledge hammer, which weighed, according to the proof, about eighteen pounds, and to break up the rock which was on the hill side, just above the men engaged in knapping the rock, and then to carry or hand down the rock to them upon the knapping yard. The evidence for appellee tends to show, and, in fact, he himself testified, that he was sitting with his back to the hill, engaged in his work of knapping rock, and that he did not know that Jesse Tipton was breaking the rock with the sledge hammer on the hillside just above him, and there was other proof conducing to show that the noise made by the hammers used by those engaged in the knapping on the knapping yard prevented the appellee from becoming aware of the operations of Tipton. Appellee says that no one gave him any notice or warning as to what Tipton was doing, and the first he knew of it a piece of rock, weighing about twelve pounds, came down the hill with great force, and struck him upon the back, near the spinal cord and kidneys, and injured him very seriously; that when said rock struck him just above the hips, and near the spinal column, he looked around and seeing Tipton, called to him, "What do you mean, you will kill some one;" that he then began to get sick, and arose, with the assistance of the hammer, to his knees, when he asked the other employes to assist him, and they helped him to the shade, and, securing a broad plank, put him upon it and carried him to the house of David Powell, and then, se-

curing a buggy, he was taken to another house, where he remained abed for twenty-one days. The proof further shows that on the day and night on which he was injured blood passed with his urine, and that after three weeks he was able to go home. He was confined in his own house for forty-six days, and had not been able to do any labor from that time until the time of the trial, which took place on the 13th day of December thereafter. A physician, who testified upon the trial, stated that he had on that day examined appellee, and that he found a condition of atrophy existing, and a wasting of the muscle of the back, and, in his opinion, the injury was permanent.

The appellee, in his petition, claimed that the appellant had not used ordinary care to furnish him a safe place in which to work, or to keep it safe while he was engaged in the work, and that appellant, by its agent and foreman, John Wilkerson, was grossly negligent of his safety when he caused Tipton to break the rock on the hill above him in the manner in which he did, and that this negligence was the direct and proximate cause of his injury; that Tipton was performing the work of breaking up the rock by the immediate command and in the presence of Wilkerson, who could, by the exercise of ordinary care, have seen the danger in which appellee was situated from the liability of the stones rolling or being knocked down the hill against him, and knowing of the said danger, had directed Tipton to break the rock at that place, and in that manner, and gave him, appellee, no warning of the danger, and asked that he be allowed damages in the sum of \$2,500.00 against appellant.

The defendant, by its answer, traversed all of the allegations of negligence alleged against it, and, in addition, pleaded that the appellee was negligent himself to such a degree that otherwise the injury would not have happened, by sitting with his back to the hill, where he knew the rocks were being broken up in the manner stated, and, in another paragraph, alleged that the injury incurred by appellee was one of the assumed risks incidental to his employment. The allegations in regard to contributory negligence and assumed risk were controverted by reply. The trial resulted in a verdict of the jury awarding to appellee damages in the sum of \$800.00. Appellant having filed grounds for a new trial, and same being overruled, he appeals to this court.

The appellant, by its counsel, insists that the judgment ought to be reversed and a new trial granted for three reasons, the first of which is: That the injury complained of by appellee was caused by the act of a fellow-servant of appellee and that appellant is not responsible therefor; second, that the court erred in the instructions given to the jury; and, third, that the court erred in refusing to give instructions asked for by appellant; and we will take up the discussion of these grounds in their order.

The appellant insists very earnestly that Jesse Tipton was a fellow-servant of the appellee, and that the injury to appellee was solely from the act of Tipton, and for that reason there could be no recovery against the appellant. Upon the other hand, the appellee insists that Tipton was not his fellow-servant, and for that reason his injury resulted from a negligent act of another employee of appellant in another field of labor, and that appellant was responsible therefor. We do not think there can be any serious controversy as to the fact that Tipton was a fellow-servant of the appellee. Tipton was engaged in the same kind of labor, except as to the fineness with which he was required to break the rock; he was working at substantially the same place, and substantially performing the same duty of appellee, and was of the same class with appellee, being a common laborer under the authority of the foreman, Wilkerson. The foreman, Wilkerson, being immediately present, and directing the methods by which the rock should be broken, and having directed Tipton to engage in breaking up the rock with the sledge at the place where he did so, and having directed him as to the manner with which he was to break them, and Tipton having followed the orders and directions of the foreman upon that subject, we are of the opinion that the master was responsible for the injurious effects of the act commanded by Wilkerson, which resulted in the injury to appellee, provided appellee was then exercising ordinary care for his own safety. It was the duty of Tipton to obey the order of Wilkerson, and there is no controversy but what he received the command from Wilkerson to break the rock at the place and in the manner in which he did.

In the case of *L. & N. R. R. Co. v. Crady* (73 S. W., 1126) this court said:

“For appellant it is claimed that Thomas being in the same line of employment as appellee was a fellow-

servant, and that the negligence resulting in the accident, if any one was negligent but appellee, was that of Thomas, and that, therefore, there can be no recovery. There was proof to support the claim of the appellee that Thomas acted under the direct command of his superior, and that therefore his act was the same as if the superior had in person done the thing. In other words, the act was not the result of Thomas' judgment or lack of judgment, or his care or lack of care. The controlling mind in the transaction was that of the foreman."

In the case of *American Machine Co. v. Ferry* (141 Ky., 374), where one Kuesler was the foreman of the defendant and in charge of the men making some repairs, this court said:

"If Kuesler was sent there with the laborers, and in charge of them, directing the working, he in doing so represented the master. The duty to furnish the servant a reasonably safe appliance to work with is one not assignable, and the master is liable to Ferry, if Kuesler rendered the coils unsafe, and when he knew they were in an unsafe condition, assigned Ferry to work upon them, the latter being ignorant of the danger. The proof was clear that Ferry was a mere laborer, and knew nothing of the danger of the work; that the danger had been created by the master, and if the proper precautions had been taken, the injury to Ferry would not have occurred."

Commencing with the case of *L. & N. R. R. Co. v. Collins* (2 Duvall, 118), and in a continuous and uniform line of decisions since that time, this court has held that the master is responsible for the gross negligence of a superior, which resulted in the injury of a subordinate employee. Furthermore, when the servants are of the same rank, and engaged in the same field of labor, the master is not responsible for the gross negligence of a fellow-servant resulting in the injury of another servant.

The foreman being the superior of the appellee and his fellow-laborers, the master is responsible for the grossly negligent act of the foreman, which resulted in the injury to appellee. For these reasons the court did not err in refusing to give an instruction to the jury to find for the appellant.

The negligence in the case at bar did not consist in the manner in which Tipton broke the rock, but the



negligence consisted in the fact that the foreman, knowing that appellee was sitting at the foot of the hill, with his back to the rock pile upon the hill, directed Tipton to break the rocks with a large hammer at the place where they were situated on the hill, just above the appellee, and where, it appears, it would be evident to any one exercising any care that the rocks were liable to be knocked down, or to roll down with considerable force against the back of the appellee. This put the appellee in an unsafe place to do his work, of which fact, according to the evidence, he was given no warning. It was clearly the duty of the foreman, when he caused this work to be done by Tipton, to have warned the appellee of the fact, so that he might take steps to secure his safety, and receiving no warning, the master is responsible, unless appellee had already observed the danger to himself, or could, with the exercise of ordinary care, have known it. If the foreman had directed Tipton, instead of breaking up the rock into pieces at the place where they were, to have rolled them down the hill against the appellee, and on to the knapping yard, without giving appellee any warning, no one would question but what this would have been a grossly negligent act, wanton, and without excuse. To cause Tipton to operate upon the rock in a way which would reasonably appear to any prudent man, would endanger appellee by causing large pieces of them to roll down and strike the appellee while he was engaged in his labor, could not be very far short of the same degree of negligence that he would be guilty of by directing them to be rolled down, as stated above.

It is also the duty of the employer to use ordinary care to secure the safety of his servants from injury, and to adopt a reasonably safe mode in which to do his work, so as to protect his servants from injury.

We will now proceed to discuss the appellant's contention that the court did not properly instruct the jury. The court gave to the jury six instructions, in the first of which it instructed the jury of what actionable negligence consisted, in the second, it defined ordinary care; in the third, it defined gross negligence; in the fourth it defined the rights and duties of both the appellee and the appellant; and in the fifth, it defined the measure of damages which the jury might allow, if they found a verdict for the plaintiff. The sixth instruction only per-

tained to the duty of the jury, if less than twelve of them or as many as nine of them agreed upon a verdict.

The first instruction is as follows: "Actionable negligence is the failure to observe for the protection of the interest of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such person suffers injury." It seems to be the fault of this instruction that it opens to the jury too wide a field for speculation, as to what the circumstances of any particular case justly demands. This court has often defined ordinary negligence as being a failure to exercise that care which ordinarily prudent persons would exercise under like or similar circumstances.

While the instruction defining gross negligence is one which has been approved by this court in the case of *L. & N. R. R. Co. v. McCoy* (81 Ky., 403); *I. C. R. R. Co. v. Stewart* (63 S. W., 595); *C. & O. Ry. Co. v. Broad* (77 S. W., 189), and no reversal of this cause could or should be had on account of that instruction. We think it is better, however, to give the instruction which is now most usually given, that gross negligence is the absence of slight care.

The fourth instruction is faulty in that it permits the jury to find for appellee if he was injured by the ordinary negligence of the foreman, Wilkerson. By a uniform line of decisions in this court it has been held that the employer cannot be made responsible for the ordinary negligence of a superior employee, which resulted in an injury to a subordinate employee; that the employer can only be made responsible for the gross negligence of a superior employee, which results in an injury to an inferior one. *L. & N. R. R. Co. v. Collins* (2 Duvall, 118); *Volz v. Railroad Co.* (24 S. W., 119); *Railroad Co. v. Rains* (23 S. W., 505); *C., N. O. & T. P. Ry. Co. v. Palmer* (33 S. W., 199); *Kentucky Distillers & Warehouse Co. v. Schrieber* (73 S. W., 769).

The fifth instruction given by the court was erroneous, in that it directed the jury that if it believed from the evidence that the injury complained of by appellee was inflicted on him through the gross negligence of appellant's foreman, that it might find punitive damages against appellant. (*C., N. O. & T. P. Ry. Co. v. Palmer*; *Kentucky Distillers & Warehouse Co. v. Schreiber*, *supra*.)

The rule adopted in this state is that the master may be made liable for any injury resulting to a subordinate from the grossly negligent act of a superior in authority among his employes, but he is in no case liable for anything more than compensatory damages to a subordinate on account of injuries resulting to a subordinate from the gross negligence of a superior.

The instruction marked "Y" offered by appellant and rejected by the court, was one relating to the safety of the place in which appellee was assigned to work by the foreman, Wilkerson, should have been rejected by the court, because it was entirely abstract in its terms and required the jury to find, before they could find a verdict for appellee, that he was injured by the unsafeness of the place in which he was working, instead of the manner in which all of the evidence showed that the injury came about.

The instruction asked for by appellant and rejected by the court, directing the jury that appellee, in accepting employment from appellant, assumed all of the ordinary risks and dangers incident to such employment, and if they believe from the evidence that he was injured by the ordinary risks and dangers incidental to this character of work in which he was engaged, they should find for the defendant. This instruction, we think, was properly refused, for while as an abstract statement of the principles of the law appertaining to a case in which it should be given, it is probably correct, but we are not of the opinion that the injury received by appellee was one of the ordinary risks incidental to his employment, and, besides, an injury caused by an act of negligence by the employer, and which would not have occurred but for the negligence of the employer, cannot be considered in any state of case as an assumed risk on the part of the servant. Assumed risk is one which grows out of the contract between the master and servant by which the servant agrees to assume all of the ordinary risks and dangers incidental to the work in which he is to be engaged, but he in no state of case could be presumed to have agreed to assume the risks and hazards of the negligence of his master or the gross negligence of his superior in authority.

The contention of appellant that the court ought to have given the instruction asked for by it upon the subject of appellee's contributory negligence, is without

merit in this case, because this was substantially given in instruction number four, which was given by the court, and in terms more favorable to the appellant than the one offered by it and rejected.

For the reason above stated, however, the judgment appealed from in this case is reversed, and this cause remanded to the court below with directions to proceed in conformity with this opinion.

### **First National Bank v. Sanders Bros., et al.**

(Decided January 27, 1915.)

#### **Appeal from Allen Circuit Court.**

1. **Judgment—Constructive Service.**—A personal judgment cannot be rendered against a defendant who is constructively summoned, and has not entered his appearance.
2. **Judgment—Constructive Service.**—A judgment in rem can not be rendered against a defendant constructively summoned, except in favor of a plaintiff who has acquired a lien by attachment or otherwise, against the property of the non-resident, and then the judgment can only be to subject the property of the non-resident to the payment of his debt, to the extent of the proceeds of such property.
3. **Attachment—Affidavit for Warning Order—Corporations.**—An affidavit for a warning order or attachment at the suit of a private corporation, must be made by its chief officer in the county, unless such officer be absent, in which case it can be made by an agent or attorney, whose affidavit must show that such officer is absent from the county.
4. **Corporations—Chief Officer of.**—Who the chief officer of a private corporation is, is defined by Section 732, Subsection 33, of the Civil Code.
5. **Attachment—Non-resident Defendant—Appearance.**—A non-resident defendant, who is then absent from the State, and who does not cause a forthcoming bond, provided for in Section 214, of the Civil Code, to be executed for him, and who does not thereby obtain or retain the possession of the attached property, does not enter his appearance to the action, on account of Section 690, of the Civil Code, when a forthcoming bond is executed by some one else who claims to own the property, and who obtains or retains possession of it thereby, although said bond on its face purports to be executed for the non-resident.
6. **Attachment—Discharge of.**—When the petition of a plaintiff is dismissed, it has the effect of discharging an attachment sued out by the plaintiff, although the judgment dismissing the petition does not order a discharge of the attachment.

GILLIAM & GILLIAM for appellant.

GOAD, OLIVER & GOAD for appellee.

## OPINION OF THE COURT BY JUDGE HURT—Affirming.

On the 11th day of February, 1914, the appellant, First National Bank, filed its petition in equity in the Allen Circuit Court against Charles Sanders and Sanders Bros., and in the petition alleged that Charles Sanders was indebted to it in the sum of \$100.00, and with interest from September 24th, 1913, by reason of a promissory note which he had executed to the appellant on the 24th day of May, 1913, and further alleged that the firm of Sanders Bros., which was composed of Charles Sanders and Bernie Sanders, had made the firm of Sanders Bros. liable upon said note by writing the name of Sanders Bros. across the back of the note with the intention of indorsing the same, and that Charles Sanders had left the State for the purpose of cheating and defrauding his creditors, and that the defendants were then selling their property with the announced intention of quitting business, and removing their property from the State, and were disposing of their property with the fraudulent intention of cheating and hindering their creditors in the collection of their debts, and that Charles Sanders was then a non-resident of the State and prayed for a judgment against Sanders Bros. for the amount of the note sued on and for a general order of attachment against the property of the defendants, and that enough of it be sold to pay the appellant's debt, interest, and cost. On the same day the appellant filed another suit in the clerk's office of the court against the same parties, in which it alleged that it held a promissory note for the sum of \$50.00 against Charles Sanders, executed on July 5th, 1913, and due two months thereafter; and that, furthermore, during the month of October, 1913, at various times, Charles Sanders had drawn checks upon it for various amounts, in all amounting to the sum of \$180.00, which appellant had paid and charged same to Charles Sanders, who, it seems, had no funds in bank to satisfy the checks, and that they also had an overdraft charged to Charles Sanders for \$47.22, and that this indebtedness was made while he was a member of the firm of Sanders Bros.; that since said time the firm of Sanders Bros. had pretendedly made a dissolution of their partnership, and that their partnership effects had been taken over by Bernie Sanders without any consideration, and for the purpose of defrauding the creditors of Charles Sanders; that Charles

Sanders had left the State, and asked the court to adjudge that the pretended dissolution of the said partnership was a fraud, and to set it aside, and for a general order of attachment against all of the defendants, and that the assets of the partnership of Sanders Bros., and the interest of Charles Sanders, be subjected to the payment of its debt, interest and cost. The appellant procured a warning order to be made against Charles Sanders in the first named suit, but failed to do so in the last named suit. The two petitions contain sufficient allegations, all of which we have not enumerated, to entitle the appellant to a general order of attachment in each case, and the petitions were sworn to by H. P. Gardner, the cashier of appellant bank. Whether appellant had a summons or an order of attachment issued upon these petitions we do not know, or whether the attachment was ever levied, or summons ever executed upon Bernie Sanders, we do not know, since there is no summons nor order of attachment copied into the record. We can only infer that there was an order of attachment in one or the other, or both of said cases, from the fact that on February 18th, 1914, B. Sanders, with A. Sanders, W. C. Goad, Sr., and Francis R. Goad as sureties, executed a forthcoming bond to the appellant in accordance with Section 214 of the Civil Code, in the presence of the sheriff of the county. The order of attachment, if there was one, and the return thereon, not being in the record, we are unable to say upon what it was that the attachment was levied.

The attorney appointed in the warning order for the non-resident defendant, Charles Sanders, in the first-named case, filed a report on the 21st day of April, in which he alleged that he had been unable to find the whereabouts of Charles Sanders until a few days before that time, and that he had direct information from him that he did not desire any defense made for him by the non-resident attorney in the suit.

Bernie Sanders filed an answer in each of the suits, in which he denied any obligation upon his part for the indebtedness of Charles Sanders, and denied the authority of Charles Sanders to bind the firm of Sanders Bros., by endorsing the note mentioned in the first suit, and denied all of the grounds of the attachment against him, and further denied all allegations of any fraudulent conduct upon his part, and alleged that previous to the filing of said suits that the firm of Sanders Bros. had

been dissolved on account of the prodigal and extravagant habits of Charles Sanders; that the firm of Sanders Bros. owed no debts at the time of its dissolution, except what it owed A. Sanders, and that the money furnished Charles Sanders by appellant was for his individual use, and upon his individual credit, and that at the time the suits were filed and the attachment levied, he was the individual owner of the stock of goods, which had been previously owned by Sanders Bros.; that they gave public notice of the fact that the partnership was dissolved at the time of its dissolution; that the indorsement of the name of Sanders Bros. on the back of the note mentioned in the first suit was done by Charles Sanders without any authority from the defendant, Bernie Sanders, or the partnership of Sanders Bros., and was for a personal obligation of Charles Sanders, and that none of the proceeds of the note was used or came into the business of Sanders Bros.

The answers of Bernie Sanders were controverted by replies filed by the appellant. By agreement of Bernie Sanders and the appellant, the two suits were consolidated and tried as one suit. Bernie Sanders also filed a written motion to discharge the attachments because the affidavit upon which they were issued was made by H. P. Gardner, who was only the cashier of the appellant bank, when A. G. Braswell, president of the bank, was in, and not absent from the county.

It seems that the evidence in the suits was given orally by the witnesses before the court, and that all the questions raised by the pleadings were submitted together, and upon a hearing of all of the evidence and a consideration of the entire case, the court adjudged that the petitions be dismissed, to which appellant excepted, and prayed, and was granted an appeal to this court.

The court below heard all of the evidence offered by the appellant and Bernie Sanders as to whether or not Charles Sanders had any interest in the attached property at the time of the bringing of the suits.

It seems from the evidence that the partnership debts of the firm of Sanders Bros. far exceeded the assets belonging to the Sanders Bros., and that the assets were all used in discharging the partnership obligations, and left a balance of several hundred dollars of the partnership obligations unsatisfied. In this state of case there would have been nothing of the partnership assets for

the court to appropriate to the discharge of the individual indebtedness of Charles Sanders.

The appellant, by counsel, insists that the court erred in not giving it a personal judgment against Charles Sanders for his indebtedness to it. There is no doubt that Charles Sanders owes the appellant the debts sued for. Section 419 of the Civil Code provides: "That no personal judgment shall be rendered against a defendant who is constructively summoned, or summoned out of this State, as provided for in Section 56, and who has not appeared in the action." This section of the code has been frequently construed by this court. (*Harris v. Adams*, 2 Duvall, 141; *Greswold v. Popham*, 1 Duvall, 170; *Berry v. Berry*, 6 Bush, 594; *Young v. Bullen*, 19 R., 1561.) This court had no jurisdiction to render any kind of a judgment against the non-resident Charles Sanders, unless the appellant had first procured a valid warning order against him, and a valid order of attachment, and created a lien upon some property owned by Charles Sanders, by levying the attachment thereon, as the appellant did not claim to have any lien upon his property, except by reason of the attachment levied. The only judgment that could have been rendered, if a valid order of attachment had been obtained, and a valid warning order made, was one to appropriate the proceeds of a sale of Charles Sanders' property to the payment of appellant's debt to the extent of the proceeds of the property.

In the second suit filed it appears that no warning order was ever made against Charles Sanders, and for that reason he could not be before the court in that case, either actually or constructively, unless he had entered his appearance to the suit, or he had had his appearance entered as provided for by Section 690 of the Civil Code. The affidavit for the warning order in these cases, as well as the affidavit upon which the order of attachment seems to have been obtained, were embraced in the petition filed, and which were sworn to by the cashier of the appellant bank, and this seems to be the only affidavit in the case.

Section 117 of the Civil Code, Sub-section 2, provides:

"That the pleadings of a private corporation must be verified by its chief officer, or agent upon whom a summons in an action is or might be lawfully served if the corporation were a defendant, or if it has no such officer



or agent residing in the county in which the action is brought or is pending, it may be verified by its attorney."

Section 550 of the Civil Code provides: "That any affidavit which this Code requires and authorizes a party to make, may, unless otherwise expressed, be made by its attorney or agent, if he be absent from the county," and Sub-section 5, of 550, provides that the affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney.

In *Northern Ice Co. v. Orr* (102 Ky., 586) this court held: "That when an agent or attorney makes an affidavit for a corporation, it must be stated that the officer of the corporation, who, if in the county, should verify the pleadings, is absent."

Section 732 of the Civil Code, Sub-section 33, defines the chief officer of a corporation, which has any of the officers or agents therein mentioned: First, its president; second, its vice-president; third, its secretary and librarian; fourth, its cashier and treasurer; fifth, its clerk; sixth, its managing agent. Section 51, Sub-section 3, of the Civil Code, provides:

"That in an action against a private corporation a summons may be served in any county upon the defendant's chief officer or agent, who may be found in this State, or it may be served in the county wherein it is brought, upon the defendant's chief officer or agent, who may be found therein."

It seems from these sections of the Code that the affidavit for a warning order, as well as the affidavit for an attachment, must be made by the chief officer or agent of the corporation, if such officer is in the county at the time, or that the affidavit, if made by any other person, is invalid, unless the affidavit shall show the connection which the party making it has with the corporation, and that the officer whose duty it is to make the affidavit is then absent from the county. The affidavit in this case shows the connection which the affiant had with the appellant-plaintiff, but it fails to show that the president of the corporation, who is its chief officer, was absent from the county. While a defense of this kind as to the affidavit for an attachment would not render the order of attachment invalid, unless this was presented to the court before any trial of the cause, but, in this case, the

motion of the defendant to quash the attachment upon that ground was made by the defendant, Bernie Sanders, before the case was submitted for trial. It has been held by this court that the provisions of the Code in all proceedings upon constructive service must be literally followed, and that nothing short of a substantial compliance with every requirement will give the court jurisdiction. (*Brownfield v. Dyer*, 7 Bush, 585; *Clark v. Raison, Jr.*, 126 Ky., 486.)

The proceedings in these cases in the light of the above named provisions of the Civil Code, and the adjudications of this court thereon, it seems that the appellant failed to comply with the provisions of the Code upon these subjects, and that the warning order obtained by him was invalid, as well as the order of attachment obtained was invalid, and gave the court no jurisdiction, either of the person or property of the defendant, Charles Sanders.

Having arrived at this conclusion, it is unnecessary to determine whether or not Charles Sanders owned any interest in the property attached at the time of the bringing of these suits, and, besides, the court below having heard all of the evidence upon that subject, it seems from the evidence that the assets of the partnership of Sanders Brothers were exhausted in the payment of the partnership debts, and there was nothing owned by Charles Sanders upon which the appellant could obtain a lien by the levying of an attachment, in order to give the court jurisdiction, and we are unable to say that the court made any error in determining that Charles Sanders had no interest in the attached property.

The indorsement of the \$100.00 note sued upon, of the name of Sanders Brothers, upon the back of said note by Charles Sanders did not make Bernie Sanders individually liable upon the debt, because it does not appear that said debt was a debt of the partnership, and Charles Sanders would have no authority to bind the partnership for his individual obligations, as the borrowing of the money for his personal use was not one within the scope of a partnership engaged in merchandising.

The appellant, however, insists that the court erred in not giving it a personal judgment against Charles Sanders on account of the execution by Bernie Sanders, with A. Sanders and others as his sureties of the bond provided for in Section 214 of the Civil Code. It in-

sists that under the provisions of Section 690 of the Civil Code, that this was an entry of the appearance of Charles Sanders to the suits. It seems from the pleadings in the case and from the evidence heard that this bond was executed by Bernie Sanders and his sureties, in order to obtain possession of the property, because Bernie Sanders was claiming to be the owner of it, and that, although the bond in its terms was a bond executed for Charles Sanders, and Sanders Brothers, and Section 690 of the Civil Code is as follows: "In an action in which an attachment has been granted, the execution by or for the defendant of a bond, whereby the attachment is discharged, or the possession of the attached property is obtained, or retained by him, shall be an appearance of such defendant in the action."

The evidence shows that Charles Sanders was then a non-resident of the State and absent therefrom, and that he took no part in said suit, nor claimed any interest in the property. The bond executed by Bernie Sanders and his sureties would not discharge the attachment if a valid one had been levied, and neither did Charles Sanders obtain the possession of the attached property, neither was the possession of it retained by him, and under this state of the case, we are of the opinion that the bond, under said provision of the code, did not enter his appearance.

The appellant also contends that the judgment appealed from ought to be reversed because the circuit court failed, by its judgment, to discharge the order of attachment. The judgment does dismiss the petitions upon which the attachments were issued, without granting the relief prayed for, and this, in effect, carried with it the discharge of the attachment. Section 260 of the Civil Code provides: "That if judgment be rendered in favor of the defendant the attachment shall be discharged," and Section 228 of the Civil Code provides: "That if judgment be rendered in the action for defendant, or if the attachment be discharged, the property attached or its proceeds shall be returned to him, and the proceedings against the garnishee shall be dismissed." It seems from these provisions of the code that if the judgment be that the appellant's suit be dismissed, that it also carries with it a discharge of the attachment.

It is, therefore, adjudged that the judgment appealed from be affirmed.

**Castillo v. McBeath.**

(Decided January 27, 1915.)

**Appeal from Wayne Circuit Court.**

1. **Mortgages—Deed Absolute on its Face—Parol Evidence.**—In the absence of an allegation of fraud or mistake, parol testimony is admissible to show that a deed absolute on its face was executed to secure a debt, and is therefore a mortgage.
2. **Mortgages—When Conveyance Declared Mortgage—Doubt.**—When a doubt exists as to whether a conveyance is a deed or a mortgage, that doubt will be resolved in favor of the debtor, and the conveyance construed to be a mortgage.
3. **Mortgages—Deed—Construction—Evidence.**—A mortgagor of a two-ninths interest in a tract of land, being unable to pay the debt when due, executed to the mortgagee a deed conveying the absolute title to all of the land, and at the same time executed a collateral agreement providing for the redemption of the land within six months upon payment of the debt and interest, the mortgagor remaining in possession. Held, under the evidence, that the chancellor properly adjudged the deed a mortgage.

J. M. KENNEDY for appellant.

W. R. CRESS & SON for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

On February 22, 1911, Jordon McBeath, a colored man about seventy years of age, borrowed from the Monticello Banking Company the sum of \$39.46, and executed his note therefor with H. C. Kennedy as surety. In order to indemnify Kennedy, Jordon McBeath and wife executed to him a mortgage conveying a two-fifths interest in a tract of land containing about seventy acres. As Jordon McBeath owned only a two-ninths interest in the tract of land, it is claimed that his interest was described as two-fifths by mistake. When the note in question became due Kennedy executed his personal note to the bank and took up the old note, signed by himself and McBeath. When the new note matured, Kennedy paid it. On June 26, 1912, Kennedy went to the home of Jordon McBeath and procured from him and his wife a deed conveying their two-ninths interest in the land to Kennedy and quitclaiming any interest as to the remainder. At the same time Kennedy executed a collateral agreement by which he bound himself to convey

to Jordon McBeath, or to any of his children, the tract of land, provided Jordon or any of his children repaid to him within six months from the date of the deed the sum of \$39.31, with six per cent. interest. The collateral agreement further provided that no difference who should redeem the tract of land, Kittie McBeath, the wife of Jordon, should have the right to keep the same as a home during her natural life, unless she should abandon the place, and Kennedy bound himself, in the event of the repayment to him of the sum above specified, to make a deed in accordance with that agreement. Shortly after the conveyance in question Jordon McBeath died, leaving a widow and five children. The land not being redeemed prior to the expiration of the six months provided in the collateral agreement, Kennedy conveyed the land to his father-in-law, Mike Castillo, who knew of the circumstances under which Kennedy acquired title.

Castillo brought this action in ejectment against Henry McBeath, one of Jordon's children, to recover the land in question, and set out in his petition the above proceedings by which he obtained title. The defendant pleaded mental incapacity on the part of Jordon McBeath, inadequacy of consideration, and that the deed was intended only as a mortgage. He also pleaded a tender within six months of the consideration expressed in the deed. On final hearing, the chancellor adjudged the deed to be a mortgage, and denied plaintiff the relief prayed for. Plaintiff appeals.

A great deal of evidence was heard on the question of tender, but, in view of the conclusion of the court, we deem it unnecessary to consider that question, or any question other than the effect of the conveyance. Jordon McBeath and his wife lived on the land in controversy, which is located about four miles from the town of Monticello. Jordon was not in good health, and Judge Kennedy, fearing that his interest in the land would not be sufficient to cover the debt on which he was surety, together with the costs of the action, rode out to Jordon's home for the purpose of getting him to execute the deed. The deed and collateral agreement had been prepared. Judge Kennedy says that Jordon's mind was in no way affected, and he was in full possession of his mental powers. The deed and collateral agreement were read to Jordon and his wife. Jordon

suggested that another clause be added, providing that, no difference who redeemed the land, his wife Kittie should have the right to keep it during her lifetime. The closing line commencing with the words "Witness my hand, etc.," was then erased and the clause in question added. During this time the defendant, Henry McBeath, was some distance away. At no time during the conversation did he say that the deed was a mere mortgage. He fully explained to the parties that it was a deed, and that they were given six months more time within which to redeem the land. It was no inducement whatever for him to take another mortgage, as he already had one on the property. He never at any time said anything to the parties or led them to believe that the deed was a mortgage. He took the acknowledgment himself. This occurred on the 26th day of June. Two days later he took up the note at the bank and gave his note in lieu thereof, payable in six months. This note was subsequently paid. There is further evidence to the effect that Jordon McBeath's wife vacated the premises soon after she was notified that Castillo had purchased them. It is also shown that after the six months elapsed defendant, Henry McBeath, came to Castillo and said that he had come to hear his doom.

Kittie McBeath, Jordon's widow, says that when Judge Kennedy came he said the instrument was a mortgage. At that time Jordon was in bad health, and his mind was "waivery." Did not know whether he had a mind sufficient to realize and understand the nature and effect of the papers he was signing or not. Did not know that she had deeded the place away. Judge Kennedy said he did not want the place, and would give them a chance to pay for it. When Mr. Castillo bought the place she moved off. It was just a few days after the six months expired. She gave up the place because she thought it was his. The defendant, Henry McBeath, testified that at the time the deed was executed Jordon's condition was not good. Jordon could read print and write a little. Judge Kennedy said he would give them six months to pay in. He did not want the home; all he wanted was his money. It was the understanding of all present that the mortgage was to be prolonged for six months. Jay McBeath, another son of Jordon, testified that he was present when the deed was executed. Judge Kennedy said it was a mortgage. He further said it

was in his power to set Jordon out of doors, but, as they had always been good friends, he was willing to fix it up so they would have six months more time. His father was very feeble at the time and died a few days later.

Though a contrary view was announced in *Munford v. Green's Admr.*, 103 Ky., 140, 44 S. W., 419, that case has been overruled and it is now the settled rule in this state that without an allegation of fraud or mistake parol testimony is admissible to show that a deed absolute on its face was executed to secure a debt, and is, therefore, a mortgage. *Hobbs v. Rowland*, 136 Ky., 197, 123 S. W., 1185; *McKibben v. Diltz*, 138 Ky., 684.

The appellant relies on the case of *Tygret v. Potter & Co.*, 97 Ky., 54. There Tygret, being indebted to Potter & Co. in the some of \$4,242, executed to them a mortgage covering about 150 acres of land, to secure the debt, which was represented by a note payable twelve months from date. When the note became due, Tygert was unable to pay it. Thereupon he executed to Potter & Co. a deed conveying the land covered by the mortgage, and at the same time he received from them a collateral agreement by which they undertook to reconvey the land to him on the payment of the sum of \$4,678.60, the consideration expressed in the deed, together with interest thereon up to the time of payment. It was held that inasmuch as Potter & Co. already had a mortgage on the entire premises conveyed at the time the deed was executed, there could have been no motive prompting the parties to so change the terms of a writing that upon its face was plainly a mortgage unless they both intended the conveyance to pass the fee in the event the debt was not paid within twelve months. For this reason the conveyance was adjudged a conditional sale, instead of a mortgage. Other circumstances that induced this conclusion on the part of the court are stated as follows:

"The evidence of the debt had been surrendered and there is no evidence conducing to show the land to be of greater value than that paid for it, or that the agreement was unconscionable or oppressive, but, on the contrary, it is manifest the appellant saw or believed he could not discharge or release the mortgage, and therefore made the best possible terms with his creditors."

The difference between that case and this is as follows: Kennedy was surety for Jordon McBeath on a

note amounting to \$39.31. He had a mortgage covering a two-fifths interest in the seventy acres of land, and it is admitted that the words "two-fifths" were used instead of the words "two-ninths." The deed which Kennedy took not only conveys, with covenant of general warranty, the two-ninths interest covered by the mortgage, but in addition thereto grants, quit claims and turns over the possession of the remaining seven-ninths interest in said tract of land, and, as to this part, the grantors warrant the title against themselves, their heirs and assigns only. It is true that Jordon McBeath had deeds to only two-ninths of the tract. There is evidence, however, tending to show that the remaining interests had been given to him, or he had title bonds therefor. Certain it is that he had been living on the land for about 35 years. The whole land is worth at least \$200, and probably as much as \$400. At the time the deed was executed Kennedy had not paid the note at the bank. He executed the new note on December 28th. The old note on which he was surety was never surrendered to Jordon McBeath. Even if we accept Judge Kennedy's statements as true, that he never mentioned the word "mortgage," he practically admits that he told the grantors that he wanted to give them six months more in which to redeem the land. His only motive for taking the deed could not have been merely to secure a deed for that to which he already had a mortgage, if, as a matter of fact, he acquired all the title that the grantors had in the land in controversy. The consideration expressed in the deed was the exact amount of indebtedness. Compared with the value of the entire tract, the consideration is grossly inadequate. The collateral agreement provides for a redemption within six months upon the payment of the debt and interest. These old negroes evidently believed that Kennedy, by virtue of the mortgage, could take their land, and were induced to execute the deed because they believed it gave them six months longer time within which to redeem the land. Thus there is present in this case every element which would ordinarily induce the court to adjudge a deed to be a mortgage. The deed was made to secure a debt. The grantors were left in possession. There is a collateral agreement permitting the redemption of the land on payment of the consideration with interest. The consideration is grossly inadequate, and the transaction therefore oppressive if the instrument



is held to be a deed. The only circumstance to the contrary is the fact that the grantee in the deed already had a mortgage on the premises. As before stated, however, this cannot have a conclusive effect on the case, for the reason that there was an additional inducement to get a deed growing out of the fact that the grantee got the whole tract instead of the two-ninths covered by the mortgage. While it is often difficult to determine the intention of the parties with reference to conveyances like that in question, yet it is a well-settled rule of equity that when a doubt exists as to whether a conveyance is a deed or a mortgage, that doubt should be resolved in favor of the debtor, and the conveyance construed to be a mortgage. *Tygret v. Potter & Co., supra*. The facts of this case are not sufficient to make it an exception to that rule. We, therefore, conclude that the chancellor properly adjudged the deed a mortgage.

Judgment affirmed.

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### Kentucky State Journal Company v. Workmen's Compensation Board.

(Decided January 27, 1915.)

Appeal from Franklin Circuit Court.

CHARLES CARROLL, W. PRATT DALE, BROWN & NUCKOLS  
and ELMER C. UNDERWOOD for appellant.

JAMES GARNETT, Attorney General; ROBERT T. CALDWELL,  
Assistant Attorney General, and OTTO WOLFF for appellee.

RESPONSE TO PETITION FOR REHEARING BY SPECIAL  
JUDGE DORSEY\*—Extending opinion in 161 Ky., 562.

In the petition for a rehearing we are asked to modify and extend the opinion. While in no particular receding from the position taken in the opinion herein, we have thought proper to make certain statements therein more explicit.

First: The provisions of the present Compensation Act, as far as they affect the employer, are unobjection-

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\*Two of the regular Judges, Judges Hannah and Nunn, having declined to sit in this case because of interest, pursuant to Section 117 of the Constitution, Hon. J. L. Dorsey, of Henderson, and Hon. J. M. Lassing, of Newport, were appointed by the Governor as Special Judges.

able, as they do not conflict with any provisions of the Constitution.

Second: Any employe coming within the provisions of the act may voluntarily agree to accept its provisions fixing and limiting his recovery in case of injury.

Third: He may likewise voluntarily accept the provisions of the act fixing the amount that shall be recovered in the event of his death, and said sum should be paid to his dependents if he leaves any, and if not, to his personal representatives. The Legislature has no power to direct that this sum shall in any event be paid into the compensation fund.

Fourth: Some provision should be made in the act whereby the employe signifies his acceptance of the provisions of the act by some affirmative act on his part. Silence on this subject should not be construed into acceptance.

Fifth: Provision should be made in the act for appeal to a court of competent jurisdiction for review in all cases where compensation is denied or where a less sum is allowed by the board than that claimed by the injured employe.

For the reasons indicated in the opinion the act in its entirety is void. The petition for a rehearing is overruled.

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### **Commonwealth v. Stahr, et al.**

(Decided January 28, 1915.)

#### **Appeal from Fulton Circuit Court.**

1. **Statutes—Construction—Intention of Legislature.**—Courts cannot add to or take from the words of a statute to give effect to any supposed intention of the Legislature; but when the intention can be ascertained with reasonable certainty, words may be altered or supplied in a statute so as to give it effect, and avoid any repugnancy to or inconsistency with such intention.
2. **Statutes—When Court May Correct Act.**—When it is manifest upon the face of an Act of the Legislature that an error has been made in the use of words, the court may correct the error and read the statute as corrected in order to give effect to the obvious intention of the Legislature.
3. **Municipal Corporations—Territorial Limits—Monuments and Lines.**—Monuments and plain lines of location must generally, in determining the extent of territorial limits, prevail over any

mere acts of user or attempted jurisdiction by the municipal authorities.

4. **Municipal Corporations—Boundary of City.**—The corporate boundary of a city can not be extended or altered by officers or employees of the city performing work or doing other acts outside of the city's corporate limits.
5. **Deeds—Construction of.**—The meaning of a deed, that is, what it covers, is a question of law for the court; what the boundaries of a given piece of land are, is a question of construction for the court also; where they are is a question of fact for the jury.

JAMES GARNETT, Attorney General; FRANK CARR, CARR & CARR, and CHAS. H. MORRIS, Assistant Attorney General, for appellant.

J. W. RONEY for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Certifying the law.

The appellees constitute the fiscal court for Fulton county. They were indicted by the grand jury for maintaining and suffering a public nuisance, by permitting a public road known as the State Line Road, to become and remain in an impassable and dangerous condition, to the common nuisance and inconvenience of the public.

It is the contention of the appellees that the State Line Road, sometimes known as State Line Street, lies within the corporate limits of the city of Fulton, and is, therefore, not under the jurisdiction of the fiscal court. That was the only defense to the indictment; and a trial having resulted in a hung jury, the Commonwealth has prosecuted this appeal before a final judgment to have the law of the case certified. This may be done under the authority of the Commonwealth v. Huber, 126 Ky., 456.

It was admitted upon the trial that the division line between the State of Tennessee and the Commonwealth of Kentucky was along the curb line on the south side of State Street, and that the city of South Fulton, Tennessee, is immediately adjacent to and south of the city of Fulton, Kentucky, with State Street as the boundary between said cities. State Street is, therefore, entirely within the State of Kentucky, and is either a street of the city of Fulton or a county road.

That the condition of the street or road constituted a nuisance was admitted; the only question was, whether the street constituting the nuisance was a city street or a public road of the county.

The Commonwealth introduced in evidence the charter of the city of Fulton, granted by the General Assembly in 1890, defining the city boundary, and showing that the southern boundary began at the southwest corner of the Carr Institute lot and extended thence in a northwardly and northeastwardly direction until it was carried "to a stake on the brow of the hill west of the bridge on said State Line Road; thence with said State Line Road to the beginning."

This would seem to indicate, and there was parol proof sustaining the conclusion, that the northern line of the State Line Road or Street was the south boundary line of the city.

There is an obscurity in the description as to the location of the beginning point, which the charter fixes "on the State line at the southwest corner of Carr Institute lot." It is contended that the word "road" was, by mistake, omitted after the words "State Line" and that the beginning point should be fixed by inserting the word "road," thus making the boundary begin "on the State Line Road at the southwest corner of Carr Institute lot," it being claimed that this meaning is borne out by the subsequent description as above given.

The rule is that courts cannot add to or take from the words of a statute to give effect to any supposed intention of the Legislature, but when the intention can be ascertained with reasonable certainty, words may be altered or supplied in a statute so as to give it effect and avoid any repugnancy to or inconsistency with such intention. Where it is manifest upon the face of an act that an error has been made in the use of words, the court may correct the error and read the statute as corrected in order to give effect to the obvious intention of the Legislature. 26 Am. & Eng. Encly. of Law (2 ed.), 654.

Monuments and plain lines of location must generally, in determining the extent of territorial limits, prevail over any mere acts of user or attempted jurisdiction by the municipal authorities. 28 Cyc., 182.

Parol testimony was given by one of the commissioners who surveyed the city boundary to the effect that the stake referred to in the description as being on the brow of the hill west of the bridge on said State Line Road, was placed on the north line of said road, and

that the southern boundary of the city was the north line of the road.

Appellees did not seriously controvert this testimony, but sought to evade its effect by showing, over the Commonwealth's objection, that the city of Fulton, through its street commissioner, had, on several occasions, worked a portion of the State Line Road; and, further, that the police court of said city had, upon several occasions previous to the indictment, taken jurisdiction of and tried persons who had committed offenses in said road.

The second instruction submitted this defense to the jury by directing an acquittal of the defendants in case the jury should believe from the evidence that the city of Fulton had worked the road and kept it in repair at the city's expense, exercising ownership thereover; and had extended its police jurisdiction over said road.

This was error. The corporate boundary of a city cannot be extended or altered by officers and employes of the city performing work or doing other acts outside of the city's corporate limits. It is not for the municipal authorities to alter the boundaries of the city, unless the power so to do is conferred upon them by the Legislature; and when such power is conferred, it must be exercised under the circumstances and in the manner prescribed. It is axiomatic that since a public corporation can only exercise its functions within the geographical limits of its jurisdiction, that its officers and agents are limited also in this respect, and can only perform their official duties within the limits of the corporation they represent. *Abbott on Municipal Corporations*, Vol. 2, Sec. 645.

It is the duty of the court to construe statutes, city ordinances and by-laws, and to instruct the jury as to their meaning and effect; and this rule is equally applicable in criminal prosecutions.

In 4 Am. & Eng. Encly. of Law (2 ed.), 809, it is said:

"The meaning of a deed, that is, what it covers, is a question of law for the court; what the boundaries of a given piece of land are is a question of construction for the court also; where they are is a question of fact for the jury."

In 5 Cyc., 969, the rule is stated as follows:

"What are boundaries is a matter of law for the court; where they are, a matter of fact for the determi-

nation of the jury, under proper instructions from the court.”

See also *Dimmitt v. Lashbrook*, 2 Dana, 2; *Cockrell v. McQuinn*, 4 T. B. M., 63; *Ashcraft v. Cox*, 21 Ky. L. R., 31, 50 S. W., 986.

The only question really in issue upon the trial was where the boundary line was located. If it was located along the northern boundary of State Line Street or Road, as a matter of law, it did not embrace the road, and the appellees were guilty under the evidence. The testimony relating to the working of the street by the city and the exercise of its police jurisdiction over the street was incompetent and should have been excluded; and, as the second instruction was based upon this incompetent evidence, it should not have been given.

This opinion is certified as the law of the case.

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### **Knights of Maccabees of the World v. Shields.**

(Decided January 28, 1915.)

#### **Appeal from Nelson Circuit Court.**

1. Trial—Conduct of Counsel—Argument.—Counsel should never attempt to get before the jury matters beyond the record having no real bearing upon the case, merely to prejudice the jury; and while one act of such impropriety may be overlooked, if the court properly admonishes the jury not to regard it, it should not be overlooked where he persistently attempts to inflame the jurors' minds.
2. Trial—Argument of Counsel—Comments Not Supported by Record.—Where a lawyer, in argument to the jury, makes statements not supported by the record, the trial judge should, without waiting for objections, promptly reprimand the offending counsel, charge the jury to disregard his statements, and if the comments are of such prejudicial nature as improperly to influence the jury, he should set aside any verdict rendered in favor of such counsel.
3. Trial—Argument of Counsel.—In a suit to recover on a policy against a fraternal insurance company, after admitting that it was a fraternal insurance company and predicated its case upon that idea, it was unfair for counsel to argue to the contrary.
4. Trial—Argument of Counsel.—Argument by appellee's counsel that appellant, a fraternal insurance company, "had millions, with its home in Michigan, and referring to appellee as a weeping widow, and in need of money, and that the company took money that would buy bread for her and the little ones and used it to

pay officer's salaries, and that if the jury denied such cry and wail of the widow as had been heard for almost three years, they would turn her back upon her husband's grave, and her children out crying for bread," precluded appellant from having a fair trial, and after such argument, counsel did not make amends by telling the jury to "put the children out of sight, forget them."

NAT W. HALSTEAD, G. ALLISON HOLLAND and JOHN A. FULTON for appellant.

JOHN S. KELLEY and REDFORD C. CHERRY for appellee.

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

The appellee recovered a judgment on a \$3,000 insurance policy issued upon the life of her husband by the appellant, a fraternal benefit society. She recovered the same amount at a former trial, but on appeal to this court the judgment was reversed. 156 Ky., 270. The reversal was because of erroneous rulings of the lower court on matters of evidence and instructions. The opinion concluded with this admonition:

"It seems that on the trial of the case there was an effort made to get before the jury the number of children Dr. Shields had and their ages, and the date of his marriage with the beneficiary, and the fact that some efforts had been made to compromise the case. All evidence of this character was incompetent. It was not at all material when Dr. Shields was married or how many children he had, nor was it competent to show the efforts to effect a compromise."

The second trial was had in strict conformity with the opinion except as to the admonition referred to, and that was observed in the admission and rejection of testimony. The chief ground of complaint on this appeal is misconduct of appellee's counsel in arguing the case to the jury as if such matters were in evidence. Some other grounds for reversal are urged, and all of them may be embraced in the claim that the court should have peremptorily instructed the jury to find for appellant, but these questions were all raised on the former appeal, and passed upon adversely to appellant, that is, it was held that there was evidence to take the case to the jury. In fact, there were but two questions for the jury, and under proper instructions the jury were told to find for the appellee, unless they believed Dr. Shields made false answers to the questions referred to,

or unless they believed he was the offending party in the difficulty in which he was killed by Preston Neal. The evidence on this trial was substantially the same as on the former trial, so that there was no ground for modifying the instructions.

As already stated, the complaint here is as to misconduct of appellee's counsel in arguing the case to the jury. After pleading the fact that appellant is a fraternal and benevolent institution, and claiming the right of recovery on a certificate issued by an institution of that character, the appellee said in argument:

"It is not a fraternal institution; it is a cold business proposition, and the cards are stacked, stacked, I say, against the man who has the certificate of insurance."

He further argued that the premiums were exorbitant, and that insurance was much cheaper on the ordinary life plan in old line insurance companies. He undertook to demonstrate the fact by calling the jury to remember what they knew as to the cost of insurance in old line companies, less 15% dividends usually deducted from the premiums. Such matters were not pertinent to the inquiry, and, of course, there was no evidence upon which to base the argument. The court overruled objections to all of this and proper exceptions were taken. Counsel then undertook to inject into the case some of the very things which the former opinion especially admonished against as being incompetent. For instance, counsel said:

"This controversy is between this weeping widow in this unequal fight between this association with its hundreds of thousands, possibly millions, of dollars. I don't know."

To this statement counsel for appellant objected and moved the court to discharge the jury; the objection and motion were overruled; to which exception was taken.

He also said:

"Harry Shields, that twelve-year-old son, that little boy, the son of this lone widow, tells you the examination was made that night."

To that statement counsel for appellant objected and moved the court to discharge the jury; the objection and motion were overruled, to which exception was taken.

And again he said:



"Now, let's see. This order takes Dr. Shields' money; money that would buy bread for this widow and those little ones you saw playing about her, near her on yesterday; takes the money from the husband of this widow and puts it into your coffers, and it is there to-day except as drawn out in salaries by its officers."

To which statement counsel for appellant at the time objected and moved the court to discharge the jury; the objection was sustained, but the motion was overruled; to which ruling of the court in overruling the motion appellant at the time excepted. But the court did not then admonish the jury not to consider the reference to the children.

And again the same counsel said:

"You may turn this widow away with empty hands to go back in widow's weeds and back beside the grave of that stricken husband, and view the sod that rests upon his bosom with tears; you may send the little children out crying for bread; you may deny the cry and wail of the widow that has been heard for almost three years."

To this statement counsel for appellant objected; and the court said: "I will tell the jury to disregard any reference to the children and admonish the counsel."

Counsel for appellee then said:

"Gentlemen, put the children out of sight; forget them."

Counsel for appellant then moved the court to discharge the jury; the motion was overruled; to which exception was taken. But the court gave no further admonition to the jury on that point.

If it was incompetent as evidence, it was certainly incompetent in argument. A good deal more of the argument is incorporated in the bill of exceptions, and all of it was improper, but it is not necessary to burden the record with it here.

We are loath to reverse a case because of improper argument. A wide latitude is allowed in presenting a case to the jury, and we recognize that counsel, through zeal or inadvertence, at times go beyond the evidence, and even beyond the bounds of propriety in discussing a case. This court has frequently criticised such argument, but we hesitate to reverse for one mistake. Persistent disregard, however, of the rules of argument and

propriety has impelled us to reverse cases when we believed such argument largely influenced the verdict. We have held that counsel should not have the fruits of victory won so unfairly. Our view of this matter is well stated in *Kentucky Wagon Manufacturing Company v. Duganics*, 113 S. W. Rep., 128:

“Trials must be had before impartial juries and upon the facts adduced in evidence. Counsel should never attempt to get before the jury matters outside of the record and which have no real bearing upon the case merely for the purpose of influencing the prejudice and passion of the jurors. One act of impropriety on the part of an attorney in a case may be overlooked if the court properly admonishes the jury not to regard it, but it should not be overlooked where the record shows a persistence on his part in bringing to the attention of the jury matters which only tend to inflame their minds, and thus render them less able to do justice according to the law and the evidence.”

We have refused to reverse in cases where the evidence made it clear to us that the verdict was just and right notwithstanding the unfair and improper argument. But this case has not that merit. In addition to the caution given in the former opinion, this court has in other opinions condemned the character of argument which appellee's counsel resorted to in this case. *L. & N. v. Payne*, 138 Ky., 275; *I. C. R. Co. v. Jolly*, 119 Ky., 452; *McHenry Coal Co. v. Sneden*, 98 Ky., 687; *L. & N. v. Crow*, 32 Ky. L. R., 1146; *Owensboro Shovel & Tool Co. v. Monroe*, 154 Ky., 431.

From the latter case we quote:

“We have so often held that trial courts should not permit attorneys, in the presentation of their client's case, to make statements not supported by the record, that it would seem almost unnecessary to repeat it here. We have likewise held that where counsel persists in violating this rule and recovers a verdict, he should be deprived of the fruits of victory thus earned by having the verdict set aside and a new trial awarded. If trial courts would rigidly enforce this rule and promptly set aside verdicts in cases where lawyers had, in argument over the objection of opposing counsel, made prejudicial statements not supported by the record, lawyers would cease offending in this particular. Laxity tends to encourage rather than discourage this practice of indulg-

ing in too wide a range on the part of counsel in the presentation of their cases. It should not be tolerated. When a lawyer makes a statement of fact wholly unsupported by the record, the trial court should, without waiting for objection to be made, promptly reprimand the lawyer and instruct the jury to disregard the statement, and where he regards it of such prejudicial nature that it may improperly influence the jury, he should set aside any verdict obtained in favor of counsel so offending."

Such attempt as the court did make to eliminate the objectionable matter was feeble and tardy, and when counsel answered the court's admonition by saying, "Gentlemen, put the children out of sight, forget them," it was equivalent to saying, "Peace, peace; when there is no peace."

After pleading that the appellant is a fraternal insurance company, in fact predicating its case upon that idea, it is not fair to make an argument to the contrary. There was no evidence in the case about premiums charged or dividends allowed by old line companies. None of the argument which appellee made from the by-laws introduced into the case was proper, because it did not affect a single issue. If this was all that was complained of, we would hesitate to say it was so prejudicial as to demand a reversal, but when there is added to it, with persistency and reiteration, and all over appellant's objection, the argument about appellant's millions, with its home in Michigan, and weeping widow, and her need of money, and the fact that the company took money that would buy bread for her and the little ones and used it to pay officers' salaries, and the warning that if the jury denied such a cry and wail of the widow as had been heard for almost three years, they will turn her back to her husband's grave, and her children out crying for bread, there can be no doubt of its prejudicial character. After such argument, appellee's counsel does not make amends when he tells them "to put the children out of sight, forget them."

We are of the opinion that this improper argument precluded appellant from having a fair trial, and was prejudicial to its substantial rights, and for these reasons the judgment is reversed, with directions for another trial in conformity with this and the former opinion.

**Knut's Guardian, et al. v. Knut.**

(Decided January 28, 1915.)

**Appeal from Daviess Circuit Court.**

**Wills—Rights and Liabilities of Devisees and Legatees—Election—Time for Making Election.**—Section 2067 Kentucky Statutes gives the surviving husband the right to renounce his wife's will; if he fails to renounce within one year, such failure amounts to an election to take under the will, as does likewise the institution of an action claiming the lands devised, as devisee under the will.

W. T. ELLIS and J. J. SWEENEY for appellant.

MILLER, SANDIDGE & MALIN and R. A. MILLER for appellee.

**OPINION OF THE COURT BY JUDGE HANNAH—Reversing.**

S. P. Knut and Lily Barrett were married December 23, 1896. On March 28, 1898, Mrs. Knut made and published her last will and testament. About two months thereafter she gave birth to a daughter, Lily Barrett Knut, and a few days later she died.

Shortly after her death her husband caused the will to be duly probated and admitted to record.

By the will mentioned Mrs. Knut devised to her husband, appellee herein, all her estate, both personal and real, subject to certain exceptions not here involved.

In December, 1899, Knut brought a suit in equity in the Daviess Circuit Court against his infant daughter, Lily Barrett Knut, claiming to be the owner in fee simple of certain lands in Daviess county comprised in his wife's estate devised to him by her will, and praying that his infant daughter be adjudged to have taken no interest therein.

The judgment in that proceeding was appealed from (see *Knut v. Knut*, 58 S. W., 583, 22 R., 974) and this court held that the infant daughter was a pretermitted child, and that, under Section 4847, Kentucky Statutes, the devisees in the will of Mrs. Knut are limited to take effect only in the event Lily Barrett Knut shall die before reaching the age of twenty-one years, unmarried and without issue.

The land here involved is valued at about one hundred thousand dollars. Mrs. Knut at her death seems to have possessed considerable personal property also,

the exact amount of which, however, is not disclosed by the record. Nor does it appear what part of this personalty appellee received under the will, if any.

On October 16, 1913, Knut instituted the present proceeding in equity against his infant daughter and her guardian, Central Trust Company, claiming a statutory life estate in one-third of the lands mentioned, as surviving husband of Mrs. Knut, and seeking to recover from the guardian one-third of the rentals derived from said lands to the date of the institution of the action.

There was a judgment in his favor, from which the infant and guardian appeal.

1. Section 2067, Kentucky Statutes, confers upon a surviving husband the right to renounce the will of his wife. *Brand v. Brand*, 109 Ky., 721, 60 S. W., 704, 22 R., 1366; *Gillespie v. Boisseau*, 64 S. W., 730, 23 R., 1046; *Smoot v. Heyser*, 113 Ky., 81, 67 S. W., 21, 23 R., 2401; *Bottom v. Fultz*, 124 Ky., 302, 98 S. W., 1037, 30 R., 479; *Bains v. Globe Bank*, 136 Ky., 332, 124 S. W., 343, 136 A. S. R., 263.

"The law provides that he may, within one year, renounce the will and elect to take under the law. If he wishes to avail himself of the statutory right, he must follow the provisions of the statute, and his failure to do so within the time prescribed amounts to an election upon his part to stand by the provisions of the will." *Bains v. Globe Bank*, *supra*; *Bottom v. Fultz*, *supra*.

The appellee in the case at bar failed to renounce the will by following the provisions and requirements of the statute; and by his failure so to do, he has accepted the will.

Moreover, the question of the rights of S. P. Knut in the lands here involved is *res adjudicata*.

In the institution and prosecution of the former action mentioned he necessarily elected to take under his wife's will, and not under the statute.

He cannot claim both under and against the will, and having, in that action, claimed under the will, he made his election, and thereby deprived himself of the right to claim under the statute.

In *George v. Bussing*, 15 B. M., 558, a husband brought a suit to recover a certain slave which had been attempted to be devised by his wife. The court held that the husband could not claim both under and against the will, and that having, by the institution of that ac-

tion, made his election to claim against the will, he had deprived himself of the right to claim the benefit of any of its provisions. The converse of the rule there laid down is equally true. Having elected to take under the will, the rights of appellee are determined by the former judgment.

2. As construed by this court in *Knut v. Knut*, 58 S. W., 583, 22 R., 974, Knut takes no interest in the lands here involved under the will of his wife, unless his infant daughter, Lily Barrett Knut, shall die before reaching the age of twenty-one years, unmarried and without issue.

3. It is suggested by appellee that after the remand of the case above mentioned, certain creditors of S. P. Knut obtained judgments against him; that those actions were consolidated and one-third of the lands here involved were placed in the hands of the court's receiver, the rentals therefrom collected and disbursed in satisfaction of his obligations. But upon this appeal we are not concerned with the validity of the proceedings mentioned.

Appellee's failure to renounce the will bars an action for allotment of a surviving husband's statutory life estate in one-third of his wife's lands; and, in addition, the judgment in the former action mentioned rendered *res adjudicata* the question of appellee's rights in the lands here involved.

Judgment reversed.

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### **Adams Express Company v. National Bank of Middlesboro, et al.**

(Decided January 28, 1915.)

Appeal from Bell Circuit Court.

**Appeal—Review—Questions of Fact, Verdict and Findings—Credibility of Witnesses.**—It is the province of the jury to pass upon the credibility of witnesses; and a verdict on conflicting evidence will not be disturbed.

**METCALF & JEFFRIES, K. S. ALCORN and J. S. GRAYDON** for appellant.

**T. G. ANDERSON and BENNETT H. YOUNG** for appellees.

## OPINION OF THE COURT BY JUDGE HANNAH—Affirming.

The National Bank of Middlesboro and the Southern National Bank of Louisville instituted this action in the Bell Circuit Court against the Adams Express Company to recover the sum of seven hundred and eight dollars, alleged by them to have been missing from a package containing ten thousand dollars when shipped by the Middlesboro Bank to the Louisville Bank, and which, on delivery to the latter, was found to contain seven hundred and eight dollars less than that amount. There was a verdict and judgment for the plaintiffs and the defendant appeals.

The bookkeeper of the Middlesboro Bank testified that he first counted out the ten thousand dollars and arranged it in twenty packages, each containing five hundred dollars; that he then turned it over to the cashier of the bank, who recounted it in the presence of the bookkeeper and another employe of the bank; that the cashier then wrapped the money up into a package, tied a brown twine string around it and sealed it with the bank's seal; that it was then taken to the express office by the bookkeeper in a buggy, a distance of about three city blocks.

The cashier of the bank also testified to counting the money and wrapping it in a package and sealing it. He likewise says that there were ten thousand dollars in the sealed package.

Another employe of the bank, R. D. Judy, testified that he saw the cashier and bookkeeper counting the money bill by bill at the time they were making up the package for shipment.

It was further shown in evidence for the plaintiffs that the package was delivered to the Southern National Bank in Louisville, and that the teller who opened and counted it found therein only nine thousand two hundred and ninety-two dollars; that, upon discovering the shortage, he immediately summoned the cashier, and a recount was made with the same result. The teller testified that when he received the package the seals seemed to be in good shape, but there was no string around the package.

The defendant express company then showed by some fifteen or sixteen messengers who handled the package from Middlesboro to Louisville that it was carried by them in the same condition as when received by the ex-

press company and delivered to the Louisville Bank in that condition.

1. Appellant express company contends that the trial court erred in refusing to adjudge to it the burden of proof. But in this contention we are unable to concur.

In order that the plaintiffs might be entitled to recover it was necessary that they should prove that there was ten thousand dollars in the package when shipped and seven hundred and eight dollars less than that amount when delivered to the Louisville bank.

The defendant, in its answer, pleaded that either the forwarding bank made a mistake in counting the money as ten thousand dollars or that the receiving bank made a mistake in counting it as nine thousand two hundred and ninety-two dollars.

It was, therefore, incumbent upon the plaintiff to show by proof the amount of money in the package when shipped by the forwarding bank and the amount in it when delivered to the receiving bank.

When, therefore, the express company showed by its agents and messengers that they had transported and delivered the package safely, it was for the jury to say which set of witnesses it believed.

Both could not stand together; if the money was counted at both ends of the line by the banks correctly, then it must have disappeared while in the custody of the express company. On the other hand, if the express company carried and delivered the package safely, it must have been counted erroneously either at the forwarding bank or at the receiving bank.

The jury has found that the seven hundred and eight dollars disappeared from the package while in the custody of the express company; and it is not within our province to disturb their verdict.

2. The court, over defendant's objection, permitted Judy, an employe of the forwarding bank, to testify that he heard the cashier and the bookkeeper, when they finished counting the money, say that there was ten thousand dollars. This testimony was incompetent, but as both the cashier and bookkeeper testified upon the trial, and both testified that there was ten thousand dollars placed in the package by them, we do not think this error was sufficiently prejudicial to authorize a reversal.

3. Appellant also complains of the instructions. The court instructed the jury that if they believed from



the evidence that the package in question contained ten thousand dollars when delivered to the express company by the forwarding bank, and only nine thousand two hundred and ninety-two dollars when delivered by the express company to the receiving bank, they should find a verdict for the plaintiffs in the sum of seven hundred and eight dollars; but that if they believed from the evidence that either of the banks made a mistake in counting the money, then they should find for defendant.

We think this is substantially the law of the case.

Judgment affirmed.

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### **Louisville & Nashville Railroad Company v. Kenney's Administrator.**

((Decided January 28, 1915.))

#### **Appeal from Gallatin Circuit Court.**

1. **Railroads—Action for Personal Injuries—Signals.**—In a suit to recover of a railroad company for personal injury occasioned by being struck by a train while standing on its station platform, if the jury believed from the evidence that the platform was an unusually dangerous one, under the circumstances, it was the duty of the company to use some reasonably effective means other than the statutory signals to warn those on the platform of the approach of its train.
2. **Railroads—Negligence—Question for Jury.**—It is a question for the jury as to whether the defendant was guilty of such contributory negligence as to preclude a recovery.

R. B. BROWN, GEORGE B. WINSLOW and BENJAMIN D. WARFIELD for appellant.

CLORE, DICKERSON & CLAYTON and BOTTS & PERRY for appellee.

#### **OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

L. F. Kenney was killed by one of appellant's passenger trains while standing on the platform at Glencoe Station, and his administrator sues to recover damages of appellant, alleging that his death was the result of negligence of appellant's servants in the operation of its trains. The jury returned a verdict for \$10,000.

Decedent was a general merchant at Glencoe, in Gallatin county, and about 43 years old. He left his place of

business and went to the depot nearby to have conversation with his nephew, who was a passenger on appellant's train No. 10, northbound from Louisville. This train was due to run at 9:27 A. M. He was killed by another train of appellant, No. 5, southbound from Cincinnati, which was due to run at the same time. This had been the regular schedule of the two trains for at least a year, and for probably two or three years. Both trains were three or four minutes late in reaching the depot, and the northbound train from Louisville, No. 10, reached there first. It was not more than a minute until the train from Cincinnati arrived. Many of the witnesses say that the Louisville train was just coming to a stop when the Cincinnati train went by the platform. Anyhow, all agree that as the Cincinnati train went by the conductor and porter of the Louisville train were still on the car steps and no passengers had alighted. There is no platform next to the depot for the use of passengers in boarding and leaving trains. In lieu of this, the space between the main track and the siding is filled with crushed stone. This space is filled from rail to rail between the two tracks, and is 12 feet wide and about 300 feet long. To reach this platform there is a walkway from the depot across two passing tracks. The one next to the depot is called the house-track, and the one alongside the platform referred to is the passing track, and the next on the other side of the platform is the main track. These trains sometimes met at the end of the passing track, that is, the train first to arrive would finish work at the depot, and then move on to the end of the siding to wait for the other train. It was not an unusual occurrence, however, for both of them to be at the depot at the same time. On this occasion there were from 25 to 50 people on the platform, and toward the north end of it, nearest the approaching Cincinnati train, there were two or more baggage trucks, and some calves to be loaded on one of the trains. The noise of No. 10, the Louisville train, as it came in must have kept those on the platform from hearing No 5. as it blew for the station. Steam was also escaping loudly from the pop valve on the Louisville train. There is much evidence that the Cincinnati train did not blow the station whistle, or any other whistle signal, until at or about the time it hit Kenney. Those who were on the platform say they did not hear it, but

they admit that they could not have heard it because of the noise from the Louisville train. The trainmen testify, and it may be accepted as a fact, that the usual whistle was blown for the station. There are two street crossings between the whistling place for the station and the depot. The trainmen say customary crossing signals were blown at these streets, but there is quite a conflict in the proof on this point. Anyhow, no one disputes the testimony of the trainmen that the bell was ringing all the time, although those on the platform did not hear it. In fact, it could not have been heard for the noise of the other train.

As above stated, this station platform between the passing and the main track was filled with rock, and extended from rail to rail and was 12 feet wide. The cylinder and cross-beam of an engine on one track extended over the platform 26 inches. With a train at the same time on both tracks, a clearance is left of only 7 feet and 8 inches. Such a space is too close for comfort or safety between moving trains. The evidence shows that Kenney knew the train schedules. Of course, he knew, and all those on the platform knew, the Louisville train, the first to arrive, was a few minutes late, but there is nothing in the record to show that Kenney, or any of them, knew how much delayed was the Cincinnati train, or whether it would come up to the station before the Louisville train left. Anyhow, Kenney was interested in the Louisville train. His nephew was expected to be on it. Kenney's purpose was to converse with him and perhaps get aboard, depending on the conversation. Naturally he was on the lookout for him in order to talk with him as quickly as possible. He, with all the others on the platform, moved over toward the main track as the Louisville train was coming in. Kenney was standing there with his back to the main track, and close to it in order to get a better chance to see his nephew through the car windows of the Louisville train. While in this position, and as the first train was just stopping, the Cincinnati train came in, and, as it is testified to by many of the witnesses, at an unusually high and dangerous rate of speed, and without any warning of its approach. Kenney was hit by it in the side by the projecting cross-beam and instantly killed. His body was knocked over on the platform and was picked up 30 feet from the place where he

stood. It is apparent from the testimony of appellee's witnesses that they believed he was knocked 30 feet by the impact, although, from their description of his fall, it is possible that they are mistaken in this. He may have been dragged or rolled that distance by the train. Some of the testimony and argument on both sides as to the speed of the train is to some extent based on this circumstance together with his instant death. Some of appellee's witnesses say the train came to the station at a speed of 25 miles an hour. All of them say the train came in faster than usual. There is no question but that the approach and passing of the train occasioned fear in the minds of those who did see it. The conductor and other officials on the Louisville train began to shout alarms, and some of those on the platform began to shove the people back towards the Louisville train and away from the main track. One witness, who had formerly been in the railroad service, got on the main track and gave signals for the Cincinnati train to stop or slow down. But those who saw this say that no attention was paid to the signals, and the man on the track had to jump to save himself. This witness says that he gave the stop signal partly for the safety of those on the platform and also to keep the Cincinnati train from striking some of the calves there for loading, and which had gotten on the track. The calves were gotten off just in time. Accepting the statements of the trainmen as true as to whistling for the road crossing, then the closest whistle to the station was about 500 feet. No other whistle was blown until the time the train hit Kenney. The engineer and fireman say that they did not see him until they were in 10 or 15 feet of him, and then he took a step backwards, and they immediately gave sharp blasts of the whistle, but it was impossible to stop before hitting him. As a matter of fact, the engine did not stop until it had gone 150 feet beyond him. Kenney was standing at or near about the place where the engine would have stopped in the usual course of things, but appellant argues that the engine actually stopped where it was intended to stop and where it ought to stop. Attention is called to the fact that the train that morning had two extra baggage cars, and, with this unusual length of train, the engine, of course, stopped at a place further away than customary. It is seriously argued that this is such a physical fact as

to render unworthy of consideration all the opinion evidence as to the high rate of speed.

In our opinion there was a question of fact as to the speed of the train, and as to the blowing of the station and road crossing whistles. Anyhow, there were certainly two questions of fact which properly should have been and were submitted to the jury, and the first is, whether the means employed were reasonably effective or sufficient, under the circumstances of this case, and considering the nature of the platform, to warn those on it of the approach of the train. No question is raised as to their right to be on the platform at the time. Those in charge of the train had a clear view of the platform for 1,500 feet. They knew and could see the other train was coming to a stop on the siding, and that its presence narrowed the narrow platform. They knew how the platform would be still further narrowed by the occupancy of the main track by their train. They could see how the platform was crowded, and that the attention of those there was taken by the other train just arriving, and how its noise would render it unlikely that they would hear the approach of the coming train. If the jury believed from this evidence that the station platform was an unusually dangerous one by reason of these facts, it was the duty of the appellant to use some reasonably effective means other than the station or statutory signals to avert the danger, and warn those on the platform of the approach of the train, which killed decedent, and its failure to give such other warning was actionable negligence. *C. & O. v. Gunter*, 108 Ky., 362; *C., N. O. & T. P. Ry. Co. v. Champ*, 31 Ky. L. R., 1057; *Southern Ry. v. Thacker's Admr.*, 156 Ky., 483.

As stated in the *Gunter* case.

"The care required of the company must be commensurate with the danger. Where it has created an extraordinary danger, it is required to exercise extraordinary care; and what is due care in the particular case must depend upon the existing state of circumstances at the time of the injury, and it is a question for the jury to decide."

It is true these cases were for injuries at public road crossings, but the travelers were licensees, as in the case at bar, and, as stated in the *Champ* case:

"The central idea in all of them is that the company must use such care and precaution for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection. What this degree of care is must depend upon the facts of each case, and is a question for the jury."

See also *L. & N. v. McNary*, 128 Ky., 408.

Likewise, it is a question for the jury as to whether the deceased, as a licensee, was guilty of such contributory negligence as to preclude a recovery when, according to appellant's evidence, and by inference drawn from the evidence of one or two of appellee's witnesses, the deceased, while looking into one train, inadvertently stepped back too close to the other track and before those operating the train approaching on that track could warn him, or avert the killing. *Lewis' Admr. v. Bowling Green Gas Light Co.*, 135 Ky., 611, 117 S. W., 278, 22 L. R. A. (n. s.), 1169; *Conway v. L. & N.*, 135 Ky., 299, 119 S. W., 206.

We have examined the instructions carefully and are impressed that the relative duties of the parties and the questions of fact were fairly submitted, with the proper application of the principles of law pertaining thereto. As to the measure of damages, the instruction differs somewhat from the approved form in such cases. The jury were told "and in estimating the damages, if any, they should consider only the loss of power of the deceased to earn money." Ordinarily, mere verbal inaccuracies are not prejudicial, but in order to have a uniform application of the law throughout the State, it is the better practice for courts to instruct juries in the identical words which have received the approval of this court. The approved form is to award "such damages as you may believe from the evidence will reasonably and fairly compensate decedent's estate for the destruction of his power to earn money, not exceeding, etc." But we are unable to see that appellant has been prejudiced by the words used in the instructions given, or the failure to use the approved form.

The court refused to give an instruction offered by appellant to the effect that, although the servants in charge of the incoming train saw Kenney in a place of danger, yet they had the right to believe that he would move out of the way of the train and into a place of safety, and that this presumption continued until the

employees saw, or by the use of ordinary care could have seen, that Kenney was oblivious to the fact that he was in danger. There is no fact proven to show that Kenney was ever conscious of his danger, nor is it contended that the employees in charge of the train saw Kenney until about the moment the train hit him. The right of recovery was not whether the employees could have averted the injury after seeing him. The questions were whether they negligently failed to give decedent warning of the approach of the train, and whether, in view of the crowded condition of the platform, which they could plainly see, and the presence and noise of the other train alongside, there was negligence in the operation of their train.

The judgment of the lower court is affirmed.

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## National Benefit Association v. Clay, Insurance Commissioner.

(Decided January 28, 1915.)

### Appeal from Franklin Circuit Court.

1. **Insurance—Right of Foreign Assessment Association to do Business in This State.**—When a foreign assessment association has fully complied with the requirements of Section 680 of the Kentucky Statutes, and is in a sound condition, and there is nothing in its charter or by-laws or method of doing business that is obnoxious to the laws of this State, the Commissioner of Insurance is not authorized to refuse it a certificate to do business in this State.
2. **Corporations—Foreign Corporations to Do Business on Equality With Domestic Corporations—Construction of Section 202 of Constitution.**—Under Section 202 of the Constitution a foreign corporation will not be allowed to transact business in this State on more favorable conditions than like domestic corporations, but it is not necessary that a foreign corporation seeking authority to do business in this State should be incorporated or organized according to the forms prescribed for the incorporation or organization of domestic corporations.
3. **Corporations—Construction of Section 202 of Constitution.**—Under this section when a foreign corporation comes into this State, no matter how it was incorporated or organized in another State, it cannot do business in this State under more favorable conditions than like domestic corporations.
4. **Insurance—Powers of Commissioner.**—Under Sections 752 and 753 of the Kentucky Statutes the Commissioner of Insurance has

ample power to protect the people of the State against foreign companies that are not in a sound condition or that fail or refuse to comply with the laws of this State, and when a foreign corporation is admitted to do business in this State this privilege does not in any manner interfere with the right of the commissioner to compel it to do business in conformity with the laws of this State, and the provisions of its charter and by-laws, or to at any time exclude it from the State if it is doing business in violation of our law or in a manner not authorized by its charter or by-laws or if its affairs for any reason become in an unsound condition.

JAMES H. POLSGROVE and J. P. HOBSON & SON for appellant.

JAMES GARNETT, Attorney General, and M. M. LOGAN, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

This is a mandamus suit by the appellant insurance association to compel the appellee, M. C. Clay, Insurance Commissioner for the State of Kentucky, to issue to it a certificate authorizing it to transact business in the State. The circuit court on demurrer dismissed the petition on the ground that it did not state facts sufficient to constitute a cause of action, and the association appeals.

The petition averred, in substance, that the appellant was a corporation created under the laws of the District of Columbia. That its object was to provide aid to its members when, by reason of sickness or accidental injury, they become entirely disabled temporarily from their business pursuits, and to furnish a fund to their families or dependents in the event of their death, the fund for this purpose to be created by dues and assessments levied upon the members.

It was further averred that the capital stock of the association was five thousand dollars, divided into five hundred shares of the par value of ten dollars each, and that the members of the association might be shareholders of the capital stock thereof; that at the time of the organization and the amendment thereto the capital stock was fully subscribed for.

It was further averred that the property of the association and its assets were set apart as a fund out of which all expenses and losses should be paid, and from the surplus at the close of each year the board of directors might direct the payment of such dividends as



the operation and profits of the association in its judgment warranted, and such dividends should be payable to the stockholders of record at the date of the declaration thereof. That it issued policies and made agreements with its members whereby it undertook to pay them, in case of sickness or injury, benefits, the money to pay which was derived from voluntary donations, admission fees, dues and assessments collected from the members.

It was further averred that on December 31, 1913, it had, in good faith, and in full force and effect, 58,692 policies of insurance issued to persons, who were eligible to have such policies issued to them, and that the amount of insurance in force on that date was \$3,205,106.70, and the total assets of the association on that date were \$152,578.50. That on the 15th day of September, 1914, it deposited with Clay, as Commissioner, a certified copy of its articles of incorporation, a copy of its statement of business for the year ending December 31, 1913, and also a verified certificate that it had paid and had ability to pay all of its policies, and also a certificate from the Superintendent of Insurance for the District of Columbia certifying that it was entitled to do business in that District, and that he held for the benefit of policyholders good securities in which insurance companies are allowed by law to invest their capital amounting to fifty thousand dollars. That it also filed with the Commissioner a copy of the form of application for membership, a copy of its policy to be issued, and of its constitution and by-laws, all of which show that indemnities to beneficiaries are in the main provided for by assessments on the members.

It further averred that it was made to appear to the Commissioner that the affairs of the association were in sound condition and its business carried on in accordance with the terms of its constitution and by-laws. That when it tendered this information to the Commissioner it offered to deposit with the Superintendent of Insurance of the District of Columbia an additional fifty thousand dollars in good securities in which insurance companies are allowed by law to invest their capital, or to deposit with the Treasurer of the State of Kentucky, or with the Superintendent of Insurance of the District of Columbia, for the benefit of its policyholders, good securities, amounting to not less than ten

thousand dollars, in which insurance companies are allowed by law to invest their capital.

It further set out that it was authorized to do business in five named States, but that the Insurance Commissioner, although it furnished him, at the time and in the manner stated, the necessary information showing its right to do business in this State, refused to issue to it a certificate giving it the right to transact business.

Accepting as true all these averments, which stand confessed by the demurrer, the question is, does the association make out a case entitling it to the relief sought? The answer to this question must be found in the Statutes, as the reasons that influenced the Commissioner to refuse the certificate, although they should have been made a part of the record so that we might have this assistance in disposing of the case, have not been filed; but it appears from the brief filed in behalf of the Insurance Commissioner that he refused to grant the association the right to do business in this State "because its charter does not conform to the laws of this State, and the provisions of its charter are inconsistent with the laws of this State."

We think there can be no doubt that the association is an assessment insurance company within the meaning of Sections 660-681 of the Kentucky Statutes. These sections not only provide for the incorporation in this State of assessment insurance companies, and for the admission into this State of foreign companies, but lay down rules applicable alike to domestic and foreign insurance companies in the conduct of their business in this State. Many of these sections, and, in fact, all of them, unless it is specifically stated that they apply to domestic companies or to foreign companies, or this follows by necessary implication, are applicable to both classes of companies alike. But Section 680 applies alone to foreign companies and sets out the conditions under which such companies may be admitted to do business in this State.

It provides that a foreign company desiring to be admitted "shall deposit with the Commissioner a certified copy of its charter or articles of incorporation, a copy of its statement of business for the year ending the 31st day of the next preceding December, sworn to by the president and secretary, or like officers thereof, setting forth the number and amount of certificates of

membership or policies in force, and a detailed account of its expenditures, income, assets and liabilities, and also a certificate sworn to by the president and secretary, or like officers thereof, setting forth that it has paid, and has the ability to pay, its certificates or policies to the full limit named therein; that its certificates or policies are payable only to the beneficiaries having a legal insurable interest in the life of the member or insured; that an ordinary assessment upon its members is sufficient to pay its maximum certificate of membership or policy theretofore issued, if any, or thereafter to be issued to residents of this State, to the full amount or limit therein named."

It also provides that it shall furnish to the Insurance Commissioner of this State a certificate from the Insurance Commissioner of its home State certifying that it is entitled to do business in its home State and that the Commissioner holds on deposit for the benefit of policy-holders of such company good securities amounting to not less than the amount of the maximum certificate or policy issued by it; that any company not having such deposit in the State where it is organized may make the deposit in this State in the manner and subject to the provisions of the law applicable to companies organized under the laws of this State.

It is further provided in this section that "the certificate of authority herein authorized may be withheld from any such corporation or association whenever it may appear to the satisfaction of the Commissioner that the affairs and business of such corporation or association are in an unsound condition, or its business not carried on within the limits and restrictions of its organic law, or that any of the terms, conditions or by-laws have been or are being violated, or that said corporation shall refuse to permit a full examination of its affairs to be made when deemed necessary by the Commissioner."

It is averred in the petition, and must be accepted as true, that the association furnished to the Commissioner all the information required by this section, and that it was made to appear to him that its affairs were in a sound condition and its business carried on within the limits of its charter, constitution and by-laws, and it was willing to permit a full examination of its affairs to be made.

In addition to this, it further offered to deposit with the Treasurer of this State, or with the Superintendent of Insurance for the District of Columbia, for the benefit of its policy-holders, good securities in which insurance companies are allowed by law to invest their capital, of not less than ten thousand dollars. This offer was made to conform to the Act of 1910, which amended so much of Section 680 as provided for the deposit of good securities amounting to not less than the amount of the maximum certificate or policy issued by it so as to read that there should be deposited not less than ten thousand dollars.

Having thus observed all the requirements of Section 680, the argument is made by counsel for the association that the Commissioner had no authority to deny it admission into this State, and, if it be true that a compliance with the requirements of this section is all that a foreign insurance company must do to entitle it to admission into this State, it may well be doubted if the Commissioner had authority to refuse to the association the certificate applied for. It will be observed, however, that this section also provides that the certificate may be withheld whenever it appears to the satisfaction of the Commissioner "that the affairs and business of such corporation or association are in an unsound condition," but on the record we cannot assume that it was denied admission for this reason, as it offered to submit to an examination of its affairs and showed that it had done, or was willing and able to do, all the things required by Section 680.

It is furthermore apparent from the manner in which the case has been practiced by counsel for the Commissioner, and from the briefs filed in his behalf, that the Commissioner refused to admit the association because, in his opinion, "its charter does not conform to the laws of this State and is inconsistent with our laws," and not because, from any examination of the affairs of the association, such as might have been made under Sections 752 and 753 of the Statute, he was of the opinion that it was in an unsound condition.

Having this view of the reasons that influenced the Commissioner, the only question it is necessary to consider is, was the charter of this association, and its method of doing business as provided in the charter, so obnoxious to the insurance laws of this State as to

authorize the Insurance Commissioner to forbid it admission into the State?

It is, of course, not to be denied that foreign insurance companies engaged in the business of this association may transact business in this State, for Section 680 expressly confers this privilege upon the conditions named in the section. It would, therefore, appear that when a foreign association has complied with all of the conditions named in Section 680, it is entitled to do business in this State, unless, as the section provides, the Commissioner is satisfied "that the affairs and business of such corporation or association are in an unsound condition, or its business not carried on within the limits and restrictions of its organic law, or that any of the terms, conditions or by-laws have been or are being violated, or that said corporation shall refuse to permit a full examination of its affairs to be made when deemed necessary by the Commissioner." But these reasons for excluding the association we may put aside, as it is admitted by the demurrer that none of them existed, and so we must look to other sections of the law for the purpose of ascertaining if the charter of this association was inconsistent with or obnoxious to the insurance or other laws of this State.

Section 202 of the Constitution provides that "No corporation organized outside the limits of this State shall be allowed to transact business within the State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth." And it is suggested in argument that this association, if it obtains permission to do business in this State, will be allowed to transact its business on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this Commonwealth. But we do not think so. It is not necessary that any foreign corporation, insurance or otherwise, seeking authority to do business in this State, should be incorporated or organized according to the forms prescribed for the incorporation or organization of domestic corporations. The laws of each State differ in respect to the manner in which corporations may be incorporated and organized to transact business, and when a foreign corporation seeks admission into this State it should not be denied admission merely

because the laws of the State in which it was incorporated and organized provide methods of incorporation or organization different from the laws of this State, unless it should be that the laws of the other State under which it was incorporated are so obnoxious to the laws of this State as that it would be against the public policy of this State to permit the foreign corporation to engage in business in this State.

Section 202 of the Constitution is only intended to regulate and control the affairs of the foreign corporation after it comes into this State. Under this section when a foreign corporation comes into this State, no matter how it was incorporated or organized in another State, it will be subject to the laws of this State and cannot do business in this State on more favorable conditions than like domestic corporations; and we do not understand that this association assumes the right to transact business in this State on more favorable conditions than like domestic associations or corporations. When it comes into this State it will be subject to the laws of this State and under the supervision and control of the Insurance Department of the State in the same manner as like domestic companies.

Sections 752 and 753 of the Kentucky Statutes give the Commissioner ample power to protect the people of the State against foreign companies that are not in a sound condition or that fail or refuse to comply with the law of this State, and for the purpose of ascertaining whether or not the foreign company is in sound condition the Commissioner may examine into its affairs, and if he finds that it is in an unsound condition, or that it fails to comply with the law of this State, or that it is not carrying on business within the restrictions and limits of its organic law, or that any of the terms or conditions of its by-laws are being violated, the Commissioner is empowered under these sections to revoke its privilege of doing business in this State. *Mutual Life Insurance Co. of New York v. Prewitt*, 127 Ky., 399. So that the mere fact that this association, under the showing made in its petition for a mandamus, is entitled to do business in this State, does not, in any manner, interfere with the right of the Commissioner to compel it to do business in conformity with the laws of this State and the provisions of its charter and by-laws or to at any time exclude it from the State if it is doing

business in violation of our laws or in a manner not authorized by its charter or by-laws, or if its affairs, for any reason, become in an unsound condition.

It may be, and probably is, true that the laws of this State relating to this class of insurance companies do not afford to policy-holders the protection that insurance laws should afford, and it is evident that the Legislature believed the laws regulating this class of companies were inadequate, because, in 1912, it attempted to amend the existing law and furnish better security for policy-holders; but this act, on account of its insufficient title, was declared unconstitutional in the case of *Hall v. Clay, Insurance Commissioner*, 162 Ky., 197.

This association has provided, or offered to provide, the same security for policy-holders that domestic companies of like character are required to provide, and it appears from the petition that there is nothing in its charter or by-laws that allows it to transact business on different terms or in a different manner from domestic companies. In short, it seems to us that this association is only asking the privilege of doing business in this State in the manner and according to the method in which domestic companies of like character are permitted to transact business.

It is said, however, that the charter provisions conferring upon the five stockholders of the association the absolute control of its affairs are obnoxious to or in conflict with the laws of this State regulating like domestic companies, and, therefore, the Commissioner was warranted in refusing it admission. In support of this view attention is called to Sections 667 and 675 regulating the place and manner in which assessment associations or companies shall hold meetings and elect officers and prescribing other details in the conduct of the business; but these sections, at least in so far as they relate to the election of officers and meetings of policy-holders, refer to domestic corporations, and the mere fact that the officers of this association are under the absolute control of the board of directors does not in itself furnish a reason why it should be denied the right to do business in this State.

Upon the case as made out by the record before us, we think the association is entitled to the relief sought, and, therefore, the judgment is reversed, with directions to overrule the demurrer and for proceedings in conformity with this opinion.

**Andrews Steel Company v. Myers.**

(Decided January 28, 1915.)

**Appeal from Campbell Circuit Court.**

**Master and Servant—Assumed Risk.**—As a general rule when the danger is obvious the servant who appreciates the condition assumes the risk of any injury that may happen to him, but when the servant does not know of the danger and it is not so obvious as to put a person of ordinary prudence on notice, the master will be liable if the servant, while exercising ordinary care for his own safety, is injured by the failure of the master to furnish him a reasonably safe place in which to work.

WAITE & SCHINDEL and L. J. CRAWFORD for appellant.

VEITH & BAILEY for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

In this suit to recover damages for personal injuries the appellee, who was plaintiff, had a judgment against the appellant, that was defendant. A reversal is asked for errors in the admission of evidence, in the giving of instructions, and in refusing to direct a verdict in favor of the company.

The accident in which the appellee sustained the injuries complained of happened in this way: He was a laborer in the plant of the steel company, doing such work as he was directed to do by the foreman. On the day he was injured he was sent by his foreman from furnace number four to the ladle pit behind furnace number two to get a coil of hose. He was not given any particular directions how he should go from one place to the other, but merely told to go and get the hose.

There were, perhaps, two or three different ways Myers might have gone, but the way he did go, as appears from the evidence, was as safe and convenient as any other route, and it cannot be said that he went out of his way or that he was not authorized by the directions to go the way he did.

The hose he was ordered to get was near a pit called the ladle pit, which is an excavation in the ground several feet deep. Suspended some four feet above the ground and near this pit there was a large swinging, movable chute used to carry the molten metal from the furnace, against or near the side of which the chute was



suspended to the ladle that was placed in the pit when the metal was being run from the furnace to the ladle.

On the occasion when Myers was injured the chute was held against the side of the furnace, or perhaps molds, by a prop made of iron pipe. After Myers had gotten the hose and when he was dragging it on his way back to furnace number four, this prop, for some cause not explained in the evidence, fell down, and when the prop fell, the chute swung out toward the ladle pit from the place at which it was suspended, striking Myers and knocking him into the pit.

The negligence complained of was in having this chute propped with this iron pipe to keep it from swinging out, in place of having it made secure in its place, as could have been done by the crane or machinery with which it was operated.

One of the assigned errors is that the instructions were based on a state of facts not averred in the petition; but we do not think so. The original petition stated a good cause of action for personal injury under the law of master and servant. It averred that the chute, its machinery, equipment and appliances, were out of repair and dangerous to life and limb, and that this condition was known, or by the exercise of ordinary care could have been known to the steel company, but was unknown and could not have been known by the exercise of ordinary care to Myers. In an amended petition the cause of action was a little more elaborately stated, but the trial court erroneously, as we think, struck from this amended pleading certain pertinent averments. This ruling, however, did not leave the plaintiff without a good cause of action, and the court did not err in permitting evidence showing the condition of the chute and the reasons why it was out of repair or in an unsafe or dangerous condition.

The instructions told the jury that it was the duty of the steel company to exercise ordinary care to furnish Myers a reasonably safe place to do the work required of him and to exercise ordinary care to keep it in safe condition, and if it failed to do this, and while Myers was exercising ordinary care for his own safety, the chute swung against him and he was thereby knocked into the pit, and they further believed that the swinging of the chute was due to carelessness or negligence on the part of the steel company, they should find for

Myers, and that unless they so believed they should find for the steel company. They were further properly instructed on the subject of contributory negligence, assumed risk and obvious danger, and we think, upon the whole, the instructions presented fairly the law of the case.

The principal ground relied on for reversal is that the court refused to give a peremptory instruction to find for the steel company. This instruction was asked upon two grounds: First, that Myers, by his contributory negligence, brought about the injury he complained of; and, second, that as the danger of the place where the injury happened was obvious, he assumed the risk.

Myers testified that he had never seen a chute propped like this one was, although he probably knew that the chute would swing around if the prop was taken away from it, nor did he or any other witness testify what caused the prop to fall, although it might be inferred that it was struck by the hose and knocked out of place. There is also evidence to the effect that the chute could have been retained in its position without the use of this prop. At any rate, upon these issues it would have been reversible error if the court had taken the case from the jury, because the evidence of Myers showed that he was exercising ordinary care for his own safety, that he did not know the danger that would follow the falling down of this prop, and that no act of his caused it to fall.

Myers, of course, saw this prop, but he did not understand or appreciate the danger to himself that might arise if it fell or was knocked down. It was not usual, so far as he knew or was advised, to have these chutes propped in this way to keep them from swinging about, and, under these circumstances, he did not knowingly walk into an obvious danger or knowingly do a reckless thing. It cannot be said under the evidence that he was not in a place where he had a right to be or that he assumed by his conduct the risk of being injured by this swinging chute. If, as the evidence shows, the chute could have been kept in place without this prop, and it was unusual to use props, then we think that Myers should have been told by his foreman of the danger that might follow the knocking or falling down of this prop.

The cases of *Brucken v. Myers*, 153 Ky., 274; *Bollington v. L. & N. R. R. Co.*, 125 Ky., 186; *Wilson v. Chess*

& Wymond Co., 117 Ky., 567; Foreman v. L. & N. R. R. Co., 142 Ky., 63, relied on by counsel for appellant, presented a state of facts in which the danger of doing the way the servant did was obvious, and it was held that he assumed the risk; but here the danger of this prop falling was not obvious, and, besides, there is no evidence that anything that Myers did caused it to fall, although, as stated, it may be inferred that it was in some way struck by the hose.

We think the evidence authorized a submission of the case to the jury and that the instructions were as favorable to the company as it had a right to ask; wherefore, the judgment is affirmed.

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### Justice v. Meade.

(Decided January 28, 1915.)

#### Appeal from Pike Circuit Court.

1. **Elections—Schools—Qualification of Women Voters—Ability to Read and Write.**—In order to comply with the statute allowing women to vote in school elections, and providing that they shall be able to read and write, it is sufficient if the voter can read in a reasonably intelligible manner sentences composed of words in common use, and of average difficulty, though each and every word may not always be accurately pronounced; on the other hand, one is able to write who, by the use of alphabetical signs, can express in a fairly legible way words in common use and of average difficulty, though each and every word may not be accurately spelled.
2. **Elections—Contest—Evidence—Tie.**—In a contest over an election for school trustee, evidence examined, and held that each party received the same number of votes.

REYNOLDS & STEELE for appellant.

CHILDERS & CHILDERS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

At a regular school election held in Pike county in the year 1914 R. L. Justice and E. J. Meade were rival candidates for the office of school trustee of sub-district No. 37. On the face of the returns Meade received 28

votes and Justice 33 votes, and the certificate of election was awarded to the latter.

By an act approved March 12, 1912, the right of suffrage in school elections was conferred on all women who possess the legal qualifications of male voters, and in addition thereto are able to read and write. Chapter 47, Acts 1912, page 193.

Meade contested the election on the ground that eleven women voters who had cast their votes for Justice could neither read nor write. Justice filed an answer and counter-claim, denying the allegations of the petition, and pleading that Sam Sawyer and his wife, Fannie Sawyer, who had voted for Meade, had not resided in the district for the required time, and that Nora James and Virgie Justice, who were women, and had voted for Meade, could neither read nor write. The trial court deducted eight votes from the total received by Justice and two votes from the total received by Meade, thus leaving Justice's vote 25 and Meade's vote 26, and adjudged Meade elected to the office. Justice appeals.

Justice insists that the court erred in refusing to adjudge that Sam Sawyer and Fannie Sawyer, who voted for Meade, were illegal voters, and in adjudging that Rebecca Justice, Belle Adams and Caroline Honaker, who voted for appellant, were not qualified voters.

The point is made that the votes of Sam Sawyer and Fannie Sawyer should have been stricken from Meade's total because the allegations of the petition respecting their disqualification were not controverted. At the time appellant's brief was prepared the record before us did not contain appellee's reply controverting the allegations of the petition with respect to Sam Sawyer and his wife. However, on motion of appellee, a subpoena *duces tecum* was awarded requiring the clerk of the lower court to produce the reply. The reply is now in the record before us, and, as it denies the allegations of the petition respecting the two voters in question, and, as the evidence fails to show their disqualification, the trial court did not err in holding that they were qualified to vote.

With respect to the ability of Rebecca Justice and Belle Adams to read and write, considerable testimony was heard. Two or three witnesses testified that they could read and write, while others testified they could

not. However, it appears that the officer who was engaged in taking the depositions of the various witnesses made three efforts to obtain the deposition of Rebecca Justice and two efforts to obtain the deposition of Belle Adams, and that they refused, without sufficient excuse, to give their depositions. As there was considerable evidence tending to show that they could not read and write, and as the evidence to the contrary is by no means satisfactory, we conclude that the trial court was justified in holding that they could not read and write, because of their refusal to give their depositions, by which their educational qualifications could have been easily established.

Caroline Honaker is the only other voter left for consideration. She gave her deposition in the case, and, after testifying that she could read and write, read all of chapter five of the first book of Kings and eleven verses of Ezra. The only sample of her handwriting which she was required to exhibit was her signature appended to the deposition. It is, of course, impracticable to lay down any very accurate test for determining the voter's ability to read and write within the meaning of the statute. In a general way, we may say it is sufficient if the voter can read in a reasonably intelligent manner sentences composed of words in common use, and of average difficulty, though each and every word may not always be accurately pronounced. On the other hand, one is able to write who, by the use of alphabetical signs, can express in a fairly legible way words in common use and of average difficulty, though each and every word may not be accurately spelled. When it comes to the signature of the party, the test should not be so severe as to require that every letter in her name should be accurately formed. Many good scribes have a habit of slurring their signatures, so that it is not always possible to make out the letters composing their names. Not infrequently do all of us receive correspondence signed by parties each particular letter of whose names we would be unable to decipher were it not for the letter-heads printed on the sheet on which they appear. Therefore, it is manifest that if the question of one's ability to write should be made to depend on the accuracy of each letter of his signature, many of our most intelligent and distinguished citizens, who would resent in the most emphatic manner the imputation that

they could not write, would, if required to possess the same qualifications as women, be utterly disqualified from voting. The matter which the voter in this instance was required to read was of more than ordinary difficulty, and was read by the voter in a reasonably intelligible manner. While each letter of her signature is not accurately formed, the signature as a whole is fairly legible, and we have found no difficulty in deciphering her name. We, therefore, conclude that she could read and write, and that her vote should have been counted in favor of appellant. It follows that appellant and appellee each received 25 votes, and the trial court should have so adjudged.

Judgment reversed with directions to enter such judgment as the statute may require in the case of a tie vote in the election of a school trustee.

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### **Baldwin's Administrator v. Maggard.**

(Decided January 29, 1915.)

#### **Appeal from Boyd Circuit Court.**

1. **Automobiles—Notice—Presence on Street—Lookout.**—It is the duty of a person in charge of an automobile to have it under reasonable control; to give notice of its presence by the customary signal of sounding the horn; to keep a lookout for persons and vehicles on the street; and to exercise ordinary care to prevent injuring them.
2. **Automobiles—Pedestrian—Care Required of in Use of Street.**—It is the duty of a pedestrian using a street to exercise that degree of care which ordinarily prudent and careful persons usually observe under like or similar circumstances, to look out for and learn of the approach of vehicles upon the street, and to avoid coming in collision with them.

LEWIS P. WATSON, J. F. STEWART and JOHN W. WOODS  
for appellant.

H. R. DYSARD for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Affirming.**

On August 2, 1913, Sol Baldwin lost his life by being struck and run over by appellee's automobile on Winchester avenue, near where it intersects 29th street, in Ashland, Kentucky.

Winchester avenue is one of the principal streets of Ashland, upon which street cars run east and west, and connect Ashland with Catlettsburg and other towns in that vicinity. The streets of Ashland run north and south, and the avenues run east and west. At 29th street a suburban street car line crosses the main line on Winchester avenue. The suburban cars run north and south on 29th street, through suburban property, to South Ashland; and passengers are given the privilege of transferring from the Winchester avenue cars to the 29th street cars.

At the end of the day's work Baldwin and his brother-in-law, Copp, boarded the Winchester avenue car at 16th street, paid their fare, and procured transfers to the 29th street or South Ashland car. Baldwin was drunk. When the Winchester avenue car reached 29th street, it stopped at its regular stopping place for passengers to get off and on the car. Baldwin, with other passengers, left the car; and after Baldwin had about reached the sidewalk, some one called his attention to the fact that he had forgotten his basket; whereupon he returned to the car to get it. By this time the street was about clear of passengers.

While he was climbing upon the rear platform of the car a passenger sitting at an open window handed Baldwin's basket out of the window, either to Copp or to Baldwin; whereupon Baldwin started to return to the sidewalk, and either stumbled or staggered into appellee's automobile, which was then passing the street car. One or both of the wheels of the automobile passed over Baldwin's body, and injured him to such an extent that he died during the day.

The accident occurred between 7:30 and 8 o'clock in the evening. It is clearly shown, however, that appellee's automobile carried the usual lights; indeed, no complaint is made that the night was dark or that it was difficult to see objects in the street.

Baldwin's administrator sued Maggard to recover damages for the killing of Baldwin; and the jury having found a verdict for the defendant, the administrator appeals.

Appellant introduced evidence tending to show that Maggard's automobile was going from 25 to 35 miles an hour; while appellee showed, by the testimony of himself and at least three other witnesses, that the speed

of the automobile did not exceed from four to six or seven miles an hour, and that he gave ample notice of its approach by blowing the horn.

The only errors assigned for a reversal are, that the first and third instructions were erroneous and prejudicial to appellant.

The first instruction is a substantial copy of the instruction given in *Fulkerson v. Akers*, 145 Ky., 187, and required Maggard, who was in charge of his automobile, to have it under reasonable control. Appellant insists that the instruction should have required Maggard to have his automobile under absolute control, and to stop his automobile, and that the instruction was erroneous in that it only required him to maintain a reasonable control of his automobile.

Appellant insists that the instruction given in *Gregory v. Slaughter*, 124 Ky., 345, 8 L. R. A. (N. S.), 1228, should have been given, or that the rule there laid down should have been followed. The facts, however, in *Gregory v. Slaughter* were so radically different from the facts in the case at bar as to make the instruction there given inapplicable to this case. The trial court properly followed the law as laid down in *Fulkerson v. Akers*, in requiring appellee to have his automobile under reasonable control. This rule has been generally applied in cases of this character, and we see no reason to depart from it.

It is further contended that the third instruction was wrong, since it required Baldwin to exercise that degree of care which ordinarily prudent and careful persons usually observe under like or similar circumstances, and to look out for and learn of the approach of the defendant's automobile, and to avoid coming into collision with it. It is insisted that Baldwin's only duty was to exercise ordinary care, and that when the instruction went further and required him to look out for and learn of the approach of the appellee's automobile, it imposed upon Baldwin a duty not required by law.

The objection is over critical. The instruction only required Baldwin to be ordinarily prudent and careful under the circumstances which led to his injury, namely, to look out for and learn of the approach of the automobile which struck him. Clearly, appellant was not prejudiced by this instruction.

Judgment affirmed.



**Chesapeake & Ohio Railway Company v. Dwyer's Administratrix.**

(Decided January 29, 1915.)

**Appeal from Boyd Circuit Court.**

1. **Employers' Liability Act—Action Under—Widow Only Dependent—Entitled to Entire Amount Recovered.**—In an action brought by the personal representative, under the "Employers' Liability Act," to recover damages of a railroad company for the death of an employe, caused by the negligence of the railroad company, if the widow of the decedent is the only dependent beneficiary under the act, she will be entitled to take all the damages that may be recovered.
2. **Employers' Liability Act—Measure of Damages—Instruction With Respect to.**—The damages recoverable under the "Employers' Liability Act" by or for a deceased employe's widow as sole beneficiary, is such a sum as will fairly and reasonably compensate her for the pecuniary loss, if any, sustained by her on account of his death; and an instruction which, as in this case, so told the jury, and also told them that, in fixing the amount, they were authorized to take into consideration the decedent's age, habits, business ability, earning capacity and the probable duration of his life, as well as the pecuniary loss, if any, the widow sustained by being deprived of such support and maintenance, if any, as the evidence may have shown she would have derived from the decedent, had he lived; but that the damages allowed should be confined to the period of the widow's dependency and not exceed the aggregate sum of the decedent's probable earnings during his expectancy of life, nor more than the sum sued for in the petition, properly advised them of the law as to the measure of damages in the meaning of the act.
3. **Damages—When Not Regarded Excessive.**—A verdict awarding an employe's widow \$16,000.00 damages for his death, will not be regarded excessive, where it is made to appear from the evidence that he was a sober, industrious man, forty-five years of age; that his earnings as a locomotive engineer had averaged \$160.00 per month and his life expectancy was 24.46 years, that of the widow practically the same; and the amount of the verdict is but little more than a third of the aggregate sum of his probable earnings during his life expectancy.

PROCTOR K. MALIN and WORTHINGTON, COCHRAN & BROWNING for appellant.

R. S. DINKLE, WATT M. PRICHARD and GEORGE B. MARTIN for appellee.

**OPINION OF THE COURT BY JUDGE SETTLE—Affirming.**

This is the second appeal in this case, the opinion upon the former appeal being reported in 157 Ky., 590. As the facts out of which the action rose and questions of law involved, are fully set out in that opinion, it is unnecessary to repeat them here, it being sufficient to say that appellee's intestate, Richard Dwyer, who was a locomotive engineer in the employ of the appellant, Chesapeake & Ohio Railway Company, was killed May 12, 1910, at England Hill, in Boyd county, by the derailment of a part of a freight train upon which he was employed as such engineer, it being alleged in the petition that the intestate's death was caused by the negligence of appellant in the particulars therein named, but mainly on account of its negligence and that of its servants in failing to take the proper precautions to prevent the fall of debris upon the railroad track resulting from a landslide at the place of the accident, which caused the derailment of the train. The action was brought under the act of Congress known as the "Employers' Liability Act," approved April 22, 1908, as amended by the act of April 5, 1910.

The first trial resulted in a verdict and judgment in appellee's favor for \$14,000.00 damages. On the second trial, occurring after the reversal of that judgment by this court, appellee recovered a verdict for \$16,000.00 damages, and this appeal is prosecuted from the judgment entered upon that verdict.

It is not denied by counsel for appellant that the evidence authorized a recovery of damages for some amount, but insisted that the amount recovered on the last trial is grossly excessive, and that the trial court erred in instructing the jury as to the measure of damages. It is admitted that the deceased left but two children, a son and daughter, the former being an adult and the latter a married woman, and that neither of the children was dependent upon him for a support. So, in determining whether or not the verdict is excessive, only the damage sustained by the appellee widow can be considered.

It appears from the evidence that the deceased, Richard Dwyer, was a sober, industrious man, in good health and forty-five years of age at the time of his death; and that he was earning \$150.00 per month regularly, and often would receive from ten to twenty dollars per month in addition for extra time, which made

his monthly earnings vary from \$150.00 to \$170.00. According to the table introduced in evidence, the deceased at the time of his death had an expectancy of 24.46 years. So, taking the \$150.00 per month as a basis, he was earning \$1,800.00 per year, which, if continued through the period of the expectancy, would have aggregated \$44,028.00. If we accept \$160.00 per month as a basis, which will probably be a fair average, his earnings would have amounted to \$1,920.00 per year, and, during the years of the expectancy, reached \$46,963.20. If we take \$150.00 per month as his earnings during the period of expectancy, amounting altogether to \$44,028.00, and it be assumed that only one-half thereof, \$22,014.00, would have been required to support the wife had he lived, such half would exceed by \$6,014.00 the amount awarded by the verdict of the jury. If, however, we accept as a basis \$160.00 per month, which, according to the proof would be a fair average, it would amount during the period of expectancy to \$46,963.20, one-half of which, \$23,481.60, would exceed by \$8,481.60 the amount awarded by the verdict of the jury. If only one-third of his earnings would have been required for the support of the widow had he lived, taking \$160.00 per month as a basis for what he would have earned during his life expectancy, such third, amounting to \$15,654.40, would be only \$345.60 less than the amount recovered. Under the award made by the jury the appellee, widow of the deceased, will only receive \$654.13 each year of the 24.46 years of expectancy, which is doubtless less than she would have received had her husband lived during that time, even if allowance be made for reasonable diminution in the deceased's ability to earn money, that might be expected to result from the decline of strength during the latter years of such expectancy.

The contention of counsel for appellant that the verdict of \$16,000.00, if placed on interest at six per cent., would yield an annual income greater than the amount that the decedent's widow would have received had he lived, and yet leave her the principal to dispose of at the time of her death, was declared in the case of C. & O. Ry. Co. v. Kelly's Adm'x., 160 Ky., 296, to be without merit. In the opinion it is said:

"Appellant insists, under the principles of *Gulf & Colorado Railway Co. v. McGinnis*, 228 U. S., 173, and *Mich. Cent. Co. v. Vreeland*, 227 U. S., 59, that what the

beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount. In other words, the amount awarded ought to be such that if placed at interest, would be wholly consumed when the time of dependency ceases, and that the jury should have been so instructed. In the McGinnis case, *supra*, the court construes the Employers' Liability Act to provide compensation to certain surviving relatives of the employe, 'for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given.' With reference to the apportionment of the benefit of each, the jury must do this, 'measured by his or her individual pecuniary loss.' We are unable to see that the McGinnis case, *supra*, either in principle or by intimation, requires that the measure of damage in the instruction to juries should be any different from the one in this case. In fact, the instructions as above quoted seem to have been drawn to conform to the principles announced in the McGinnis case. The instructions limited recovery to the actual 'pecuniary loss.' Their whole loss was sustained at the time of his death. There is no more reason in appellant's theory, that the defendants should have discounted the loss, than there is that the railroad company should be adjudged to pay a fixed sum annually, semi-annually or monthly for their support. The award of the jury should be for the pecuniary loss suffered. While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependent is more than ought to be asked of any one less qualified than an actuary. We believe the instructions are not only right in form and in principle, but are in harmony with the McGinnis case."

The age of the appellee widow at the time of her husband's death was forty-three, two years younger than the husband, consequently, her expectancy of life was practically the same as his; and the criterion of recovery being only the actual pecuniary loss resulting to the

widow from the death of the husband, as the amount recovered is less than one-half of what the gross earnings of the decedent would have been during the probable duration of his life, and not more than the widow would probably have received out of such earnings for her support, had he lived, there is, in our opinion, no ground for appellant's contention that the verdict is excessive.

Appellant's complaint of the instruction as to the measure of damages is without merit. The law as given by the court on this feature of the case is found in instruction No. 4, which is as follows:

"The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, or other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of \$40,000.00, the amount claimed in the petition. And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent, and, in no event, for a longer period than her said husband would have probably lived but for the injury complained of and in question. The court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss,

if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

The measure of damages as given in the above instruction is substantially the same as that contained in the instruction given in the case of C. & O. Ry. Co. v. Kelly's Adm'x., *supra*, which received our approval in that case. It will be observed that the instruction did not, as claimed by appellant's counsel, require the jury to find for the decedent's administratrix the aggregate sum of his earning capacity during the life expectancy, but limited the recovery so that it could not exceed the actual pecuniary loss which the widow sustained by the decedent's death, or in any event exceed the amount claimed in the petition, \$40,000.00, which is, itself, less than the evidence showed the decedent's earning capacity would have been during such expectancy.

The record furnishing no reason for the reversal asked, the judgment is affirmed.

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### Howton, etc., By etc. v. Sovereign Camp Woodmen of the World.

(Decided January 29, 1915.)

#### Appeal from Hopkins Circuit Court.

1. Insurance—Fraternal Association—Death Benefit to Member of—When Association Not Liable For.—Where the constitution of a fraternal association provides that if a member holding a certificate of insurance therein becomes suspended for non-payment of an assessment, and is not, prior to his death, while in good health and within three months after the assessment became due, reinstated to membership in the order by the payment of such assessment and all arrearages then owing by him, such payment to be accompanied by a writing signed by himself and witnessed, stating that he is in good health, the insurance association, upon the insured's death, will not, in the absence of a compliance by the latter with the above provision of the constitution, be liable at the suit of the beneficiary named in the certificate of insurance for the amount thereof; and the fact that the insured before his death and within the three months indicated, sent to the clerk of the local camp, of which he was a member, the money to pay the assessment, for the non-payment of which he had been suspended, and all arrearages owing by him, even if it be conceded that the sending of the accompanying written statement as to his health was not essential, did not have the effect to reinstate

him to membership or entitle the beneficiary to the insurance, if he was at the time not in good health.

2. Insurance—Instructions—When Not Prejudicial to Appellant Cannot Give Ground for Reversal.—As the instructions given in this case ignored the provision of the association's constitution requiring the furnishing by the insured of the attested written statement as to his being in good health in order to secure his reinstatement to membership, and advised the jury that the question whether the payment by the insured of the assessment and arrearages owing by him had the effect to reinstate him, depended upon whether he was at the time of such payment in good health, were more prejudicial to the association than to the appellants and probably more favorable to the latter than they deserved, their complaint of them is without merit.

TEAGUE & FRANKLIN for appellants.

YOST & LAFFOON for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellee, Sovereign Camp Woodmen of the World, is a fraternal benefit society, incorporated under the laws of the State of Nebraska. It issues benefit certificates, conducts an insurance business among its members, and has under its jurisdiction various local camps; one of these, known as Pine Grove Camp No. 160, being located at Dalton, Kentucky. Appellee issued to Ben Howton, a member of Pine Grove Camp No. 160, a beneficiary certificate dated February 24, 1910, but not to become effective until March 12, 1910, whereby it agreed to pay to Willie Howton and Allie Howton, brother and sister of Ben Howton, at the death of the latter, \$500.00 as a death benefit, should his death occur during the first year of his membership and while he was a member of the order in good standing. Ben Howton died December 1, 1910, and appellee, having refused to pay to the beneficiaries named therein, Willie Howton and Allie Howton, the death benefit of \$500.00, they brought this action in the Hopkins Circuit Court, the latter, an infant, suing by Peter Howton, her next friend, to recover the same.

By its answer appellee interposed the defense that the insured, Ben Howton, was not a member of the order at the time of his death, but was then under suspension for non-payment of an assessment designated as No. 240, which suspension occurred October 1, 1910, and caused a forfeiture of his certificate of insurance; that he was

never reinstated before his death, for which reasons the certificate imposed no liability upon appellee for the death benefit claimed by the beneficiaries. The trial of the case resulted in a verdict for appellee, and from the judgment entered thereon the beneficiaries named in the policy have appealed.

It appears from the evidence that Ben Howton became sick and called in a physician on the 27th day of November, 1910, and that on the 28th day of November, 1910, he sent to the clerk of his camp all assessments and dues then in arrears and owing by him. One of these assessments was No. 240, for the failure to pay which on October 1st his suspension as a member of the order had resulted, and the other was assessment No. 241, which became due November 1, 1910. He did not, however, as required by the constitution and by-laws of the order, accompany the payment thus attempted to be made with a written statement and warranty, signed by himself and witnessed, showing that he was then in good health. On December 1, 1910, he was operated on for appendicitis and died two hours after the operation was performed.

The moneys which had been sent by him to the clerk of his camp were forwarded by the latter to the Sovereign Clerk of the Sovereign Camp on the 3rd day of December, 1910, two days after Howton's death, and were received by the latter without knowledge of his death; but he returned them to the clerk of Howton's camp with the direction that they be returned to Howton. This action of the clerk of the Sovereign Camp was taken because of the suspension of Howton and his failure to deliver to the clerk of his camp with the payment of the moneys the written statement and warranty, signed by himself and witnessed, that he was in good health at the time he paid the assessments in arrears, and it appears from the testimony of the clerk of the local camp and other witnesses that Howton was sick when he sent to him the money in payment of the assessments in arrears.

Sections 108 and 109 of the constitution of the Sovereign Camp, which were made a part of the certificate of insurance, are as follows:

"Sec. 108. On or about the 20th day of each month the Sovereign Commander and chairman of the Sovereign Finance Committee shall determine the number of assessments, if any, necessary to provide for the pay-



ment of death benefits, monuments and total disability claims, and shall so notify the Sovereign Clerk."

"Sec. 109. (a) Every member of this Order shall pay to the Clerk of his Camp each month one assessment payment, as required in Section 56, which shall be credited to and known as 'Sovereign Camp Fund,' and he shall also pay such Camp dues as may be required by the by-laws of his Camp. He shall pay any additional assessments for the Sovereign Camp fund and Camp dues, or either, which may be legally called.

"(b) If he fails to make any such payment on or before the 1st day of the month following, he shall stand suspended, and during such suspension his beneficiary certificate shall be void."

Assessments Nos. 240, 241 and also 242 were regular assessments as provided in Sections 108 and 109 of the constitution, *supra*, 240 being due October 1st, 241 November 1st, and 242 December 1st, 1910. So assessments 240 and 241 were past due and therefore in arrears when attempted to be paid by Howton November 28th. The failure to pay assessment 240 on October 1, 1910, under the provisions of Sub-section (b), Section 109, *supra*, automatically suspended Howton from membership in the order, and by a further provision of the same sub-section his beneficiary certificate thereby became void and continued so during such suspension.

Section 115 of the constitution provides:

"(a) Should a suspended member pay all arrearages and dues to the Clerk of his Camp within ten days from the date of his suspension, and, if in good health and not addicted to the excessive use of intoxicants or narcotics, he shall be restored to membership and his beneficiary certificate again become valid.

"(b) After the expiration of ten days, and within three months from the date of suspension of a suspended member, to reinstate he must pay to the Clerk of his Camp all arrearages and dues and deliver to him a written statement and warranty signed by himself and witnessed that he is in good health and not addicted to the excessive use of intoxicants or narcotics as a condition precedent to reinstatement, and waiving all rights thereto if such written statement and warranty be untrue.

"(c) Any attempted reinstatement shall not be effective for that purpose unless the member in fact be in

good health at the time, and if any of the representations or statements made by said applicant are untrue, then said payment shall not cause his reinstatement nor operate as a waiver of the above conditions."

The several sections and sub-sections of the constitution of the order quoted, by the terms of the certificate of insurance, constituted material parts thereof and were binding upon the insured and beneficiaries. Therefore, under his contract, expressed in the certificate, Howton's suspension automatically resulted from his failure to pay the assessment due October 1st, and such failure is admitted both as to the assessments of October 1st and November 1st. It is also admitted that neither of these assessments was paid within ten days after it became due, which, if done, and Howton had been in good health and not addicted to the excessive use of intoxicants and narcotics, would have had the effect to automatically reinstate him to membership in the order and revive his certificate, as provided by Sub-section (a), Section 115, of the constitution. But, notwithstanding such failure, he might, as allowed by Sub-section (b) of Section 115, at any time after the expiration of ten days and within three months of the date of his suspension resulting from the non-payment of the assessment due October 1st, have been reinstated to membership in the order by paying to the clerk of his camp all arrearages and dues, provided he at the same time delivered to him the written statement and warranty, signed by himself and witnessed, that he was in good health and not addicted to the excessive use of intoxicants or narcotics, and provided further that the statements as to his health contained in the writing and warranty were true. But neither of the courses indicated was pursued by Howton. It is true that on November 28, 1910, when he sent to the clerk of his camp all arrearages and dues then owing by him, such payment was within three months of the date of his suspension, but the payment did not have the effect to reinstate him to membership in the order or revive his certificate of insurance, because it was unaccompanied by the written statement and warranty, signed by himself and witnessed, that he was then in good health, and he was, in fact, then afflicted with appendicitis.

The trial court seemed to be of opinion, however, that the delivery by Howton to the clerk of his camp of

the statement showing his good health, signed by himself and witnessed, at the time of the payment to the latter of all assessments and dues then in arrears and owing by him, was not necessary in order to entitle the beneficiaries in the certificate of insurance to recover of appellee the death benefit named therein, but that such recovery might be had upon a showing that Howton was in fact then in good health. Manifestly appellants cannot complain of this ruling, for it relieved them of attempting to establish a fact they were unable to prove, namely, that there had been furnished appellee by Howton when he paid the arrearages owing by him a written statement, signed by himself and witnessed, showing his health to be good, and allowed the question whether he was entitled to reinstatement to membership in the order to be determined upon the evidence introduced as to the state of his health when the arrearages were paid.

The trial court's construction of the contract was doubtless based upon the theory that if Howton was not in good health when the arrearages were paid, the furnishing of the written statement required by Section 115 of the appellee's constitution would not have entitled him to reinstatement in the order; and that appellee's denial that his health was then good would have required appellants to establish by proof the warranty of the written statement that it was good.

The instructions given the jury are as follows:

"1. The court instructs the jury that Sovereign Ben Howton stood properly suspended from the order and his certificate was null and void on and after October 10th, 1910, and the acceptance of the payments by the clerk in November did not have the effect to revive the certificate and his membership unless the said Ben Howton, at the time of such payment, was in good faith; and the jury will find for the defendant, unless they believe from the evidence that said Ben Howton, at the time the payments were received by the clerk in November, was in good health.

"2. By the term 'in good health,' as used in the foregoing instruction is meant that Ben Howton was in such condition of health that he could then have truthfully made and filed with the clerk of Pine Grove Camp a statement and warranty that he was then in good health, believing at the time in good faith that he was

not afflicted with any bodily infirmity that would materially affect the risk of the defendant.

"3. If the jury believe from the evidence that Ben Howton was in good health as defined in the foregoing instruction, at the time the assessments were paid in November, they will find for plaintiffs \$500.00."

We are unable to see that appellants were prejudiced by these instructions. In *Royal Neighbors of America v. Laufman*, 158 Ky., 358, which was an action upon a benefit insurance certificate, the defense interposed was that the monthly assessment was not paid, which caused the suspension of the insured, and the insurance company relied upon the failure of the insured to comply with a provision in its by-laws as to reinstatement, which provision was much like the one of similar character in this case, except that it did not require the written statement and warranty as to the insured's good health to be furnished at the time of the payment of the arrearages of dues and assessments necessary to reinstatement. We held that the question whether the insured was in good health at the time of the payment by her of the amounts due and in arrears, was properly submitted under the instructions of the court to the decision of a jury.

It is, however, insisted for appellants that the assessment for the non-payment of which Howton was suspended was a special assessment, for which reason notice of it to him was a prerequisite; and that, as such notice was not given, there could be no suspension for the failure to pay it. We find nothing in the record upon which to rest this contention. There is neither allegation in the pleadings nor proof that the assessment was made for a special purpose, but, on the contrary, it is apparent from the evidence that assessment No. 240, as well as Nos. 241 and 242, were regular assessments under Sections 108 and 109 of appellee's constitution. They were not made by appellee's officers, but were such assessments as were to be paid to the clerk of his camp by Howton each month as provided by Section 109 of the constitution.

There was some contrariety of proof as to the condition of Howton's health at the time the past due assessments were attempted to be paid by him, but we think the weight of the evidence conduced to prove that his health was bad at that time; that he became sick of ap-

pendicitis and called in a physician on the 27th day of November, 1910, and had not recovered from this illness on the 28th, when he sent to the clerk of his camp the arrearages then owing by him. Indeed, according to the evidence, his illness became more pronounced and resulted in his death on the 1st day of December, 1910, following an operation for appendicitis. It appears that the money he paid the clerk of his camp during his illness was sent to the clerk of the Sovereign Camp on the 3rd day of December, 1910, two days after his death.

As there was evidence from which the jury might reasonably have reached the conclusion that Howton was not reinstated to membership in the order or entitled to reinstatement, and the record fails to show any error upon the part of the trial court that can be said to have been prejudicial to the appellants, no reason is apparent for disturbing the verdict. Therefore, the judgment is affirmed.

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### **Hall v. Commonwealth.**

(Decided January 29, 1915.)

#### **Appeal from Letcher Circuit Court.**

**Homicide—Evidence—Self Defense—Instructions.**—On a trial for murder where the evidence tends to show that throughout the difficulty others were acting in concert with the deceased, an instruction on self defense should embrace the idea that if the defendant believed and had reasonable grounds to believe that he was then and there in danger of death or the infliction of great bodily harm either at the hands of the decedent or of such others acting in concert with him, and that it was necessary or believed by him to be necessary in the exercise of a reasonable judgment to shoot the decedent to avert such danger, real or apparent, he was entitled to an acquittal.

**S. E. BAKER** for appellant.

**JAMES GARNETT**, Attorney General, for appellee.

#### **OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

Appellant was indicted in the Letcher Circuit Court charged with the murder of Talt Hall, and upon his trial was convicted and sentenced to the penitentiary for life, from which judgment he has appealed.

As there is a fatal error in one of the instructions which will necessitate the reversal of this judgment, and consequently another trial of this case, we will refrain from any extended discussion of the evidence in the case except in so far as it may be necessary to point out the error in the instruction referred to.

On the first of August, 1914, there was held a school district election at a school house in Letcher county on Rockhouse Creek; the two candidates were Lee Hall, a son of Marion Hall, and a nephew of appellant, and Lewis Hall, the father of Talt Hall, the man appellant is charged with killing. There was great local interest shown in this election, and on the day of the election a crowd gathered at this school house, and many of them, including some women, remained there until the election was over and the result announced.

While there was no particular disturbance during the election, it is shown at one time Talt Hall, Dunk Quillen, and someone else went into the house where the election was being held, at which election appellant was an officer, and Talt Hall offered to appellant some sort of a paper and demanded that he read it, which appellant declined to do; but what this paper was or the nature of it does not appear. While, as stated, there was no open disturbance, this circumstance and other occurrences during the day indicated some feeling between the adherents of the two candidates.

After the result was announced the parties began to leave the school house, appellant and his brother Marion with others going down the creek toward their homes, having left the school house ahead of Talt Hall and Dunk Quillen. Shortly thereafter Talt Hall and Quillen mounted a mule with their saddle bags, Hall in front and Quillen behind, and started in the same direction that appellant and his brother had gone; Talt Hall and Quillen had been drinking during the day, and at least one of them, as they went down the road, was yelling or at least using loud and boisterous language. In some way Marion Hall had gotten ahead of appellant, and Talt Hall and Quillen overtook appellant and some conversation occurred between Talt Hall and appellant. The exact nature of that conversation, and who began it, is more or less in doubt under the evidence, but at least two or three witnesses say that while they were so riding along beside appellant, who was walk-

ing, Talt Hall two or three times undertook to reach into the saddle pockets where his pistol was, but was prevented from so doing by Quillen.

It is claimed that Talt Hall and Quillen were on their way to the residence of a relative of Hall's named Bentley; Bentley's gate is right at a point on the road near where appellant and Marion Hall had to cross the creek; when the parties reached Bentley's gate, or reached a point in the road near Bentley's gate, Talt Hall and Quillen stopped their mule and appellant proceeded on across the creek, and after he had crossed the creek appellant's evidence shows that Talt Hall directed him to go on down the road, whereupon appellant turned around and, in substance, said that he was going down the road, but that he would do it in his own way. Appellant and Talt Hall, then at a distance of some 10 or 15 steps, Talt still being on the mule, got into an angry wordy altercation, whereupon appellant's sister, who was in the party, called to her brother, Marion Hall, who had gone on ahead and was out of sight over a slight rise in the road, to come back and arrest them and prevent a difficulty, Marion Hall being thought by her to be clothed with some sort of official authority by reason of his having been designated by the constable of the district the night before to aid in keeping the peace at the election. Thereupon Marion Hall came back, but before he reached Talt Hall and Quillen they had dismounted in response to a suggestion of Talt Hall to Quillen that "we get down and show them what we can do." Marion Hall crossed the creek where Talt Hall and Quillen were and undertook to quiet Talt, and they got into a sort of tussle there among several of them, and appellant quickly crossed to where they were. Talt Hall had never gotten his pistol out of his saddle pockets; during the tussle he called to Willard Hall to get his pistol, and when Willard undertook to get it out of the saddle pockets, Albert Hall, another brother of appellant, got hold of it and took it from Willard. About that time the shooting began, and when it was over Marion Hall, Albert Hall, Talt Hall and Quillen were dead, appellant was shot through the arm and Albert Hall's wife through the foot.

Two or three witnesses for the Commonwealth said that after the main part of the shooting was over Marion and Albert Hall and Dunk Quillen were down, and

while Talt Hall was leaning over the prostrate form of Quillen, appellant, from behind, shot him in the back of the neck, and at least two witnesses said there was evidence of powder-burn on the back of his neck.

On the other hand, appellant states, and in some respects his testimony is corroborated, that when his brother, Albert Hall, got Talt Hall's pistol, that he thought the danger was then all over and he turned and started again to go across the creek, but had only gone a few steps when the shooting began, and that either the first or second shot took effect in the back part of his arm, and that he then turned and saw Dunk Quillen and Albert Hall shooting at each other, and fired one shot at Dunk Quillen; that he thought in the excitement that Talt Hall and Marion Hall were shooting at each other and he then turned and fired one shot at Talt Hall, and that he did not know whether he had struck either one of them.

There is no substantial error in the admission or rejection of testimony, and the only error we discover in the instructions is in instruction No. 5, giving the law of self-defense, that instruction being as follows:

"If the jury shall believe and find from the evidence that, at the time defendant shot and killed the said Talt Hall, if he did shoot and kill him, he, defendant, believed, and had reasonable grounds to believe, that he or his brother, Albert Hall, or his brother, Marion Hall, was then and there in danger of death or the infliction of some great bodily harm at the hands of said Talt Hall, and that it was necessary, or was believed by the defendant, in the exercise of reasonable judgment, to be necessary, to shoot the deceased in order to avert that danger, real or to the defendant apparent, then the jury will find the defendant not guilty."

The evidence shows that Talt Hall and Quillen went to the election together; that they went in the school house together to make the remonstrance above referred to; that they were together throughout the afternoon; that they had taken dinner together at Quillen's home nearby; that Quillen had bought a pistol that afternoon while in company with Talt Hall, and had borrowed the money from Talt Hall with which to pay for it; that they had left the school house together on the same mule, and had remained together up to the time of the difficulty; and that just before they alighted from the mule



that Talt Hall said to Quillen, "let's get down and show them what we can do," whereupon they both jumped off the mule and shortly thereafter the shooting began.

Under this evidence, tending to show that Talt Hall and Quillen were acting in concert, not only throughout the difficulty, but throughout the whole day, it is appellant's contention that the instruction on self-defense should have embraced the idea that if he believed, and had reasonable grounds to believe, that he or either of his brothers was then and there in danger of death or the infliction of great bodily harm either at the hands of Talt Hall or Quillen or others acting in concert with Hall, and that it was necessary, or was believed by him to be necessary, in the exercise of a reasonable judgment, to shoot Hall in order to avert such danger, real or apparent, then he was entitled to an acquittal.

Under repeated rulings of this court there can be no doubt of the correctness of this contention.

Many judgments of conviction in similar cases have been reversed by this court for the failure to embrace this idea in the instructions, where the evidence of concert between the parties was much less convincing than it is in this case. *Lucas v. Commonwealth*, 141 Ky., 281; *Stone v. Commonwealth*, 110 S. W., 235; *Magan v. Commonwealth*, 119 S. W., 734; *Helton v. Commonwealth*, 87 S. W., 1073; *Watkins v. Commonwealth*, 97 S. W., 740; *Bowling v. Commonwealth*, 126 S. W., 360.

As the judgment must be reversed for this error in the instruction, it is unnecessary to consider the complaint that the jury was permitted to separate during the trial.

For the reason indicated the judgment is reversed, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

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## **New Bell Jellico Coal Company v. Sowders.**

(Decided January 29, 1915.)

### **Appeal from Bell Circuit Court.**

1. **Appeal—Opinion—Questions Determined.**—When an opinion is rendered in a case in the Court of Appeals, it is considered to be a determination of every question made in such case, and prop-

erly presented to the court for adjudication, whether the court in its opinion adverts to such question or not.

2. **Appeal—Verdict—Interference With.**—The court is not authorized to interfere with the verdict of a jury on account of the verdict being excessive, unless it strikes the mind at first blush as having been caused by passion or prejudice, and glaringly disproportionate to the injury received.

**WM. LOW and LOGAN & BABBAGE** for appellant.

**B. B. GOLDEN, W. R. LAY and BLACK, BLACK & OWENS** for appellee.

**OPINION OF THE COURT BY JUDGE HURT—Affirming.**

This is the second appeal by the appellant in this case. At the first trial the jury returned a verdict for the appellee, and a judgment was rendered by the court below upon the verdict against the appellant. The appellant prayed an appeal to this court, and, upon a hearing of that appeal, the judgment below was reversed and the case remanded for a new trial. The judgment of this court upon the former appeal may be found in 154 Ky., 101, to which reference is made for a statement of the facts of the case.

On the former trial, as it appears from the record of the appeal from the judgment on the first trial, appellant, at the close of the evidence for the appellee, moved the court to give an instruction to the jury to find for appellant, which motion was overruled. The court also upon that trial gave instructions which are numbered in the record 1, 2, 3, 5 upon the motion of the appellee, and instruction number four was given by the court upon the motion of the appellant. The court also upon the first trial of the case gave instruction number six upon its own motion, but this instruction related only as to how the verdict should be signed. These were all of the instructions given by the court upon that trial.

Upon the former appeal this court was of the opinion that instruction number five was erroneous, and by its judgment indicated what the instruction should be. No complaint was made upon that trial of instruction number four, as it had been given at the instance and request of the appellant. The error in instruction number five was the only error insisted upon by the appellant, which, by the opinion of this court, was determined to be prejudicial to the appellant.

Upon the trial of the cause after it had been remanded to the court below, at the close of the testimony, the appellant again moved the court to direct the jury to find a verdict for it, which motion was overruled, and the court gave the same instructions to the jury as it did on the former trial, so far as instructions number one, two, three, four and six, and gave instruction number five as directed by this court in its judgment upon the appeal heretofore. This trial resulted in a verdict of the jury in favor of the appellee in the sum of \$7,334.00, and upon this verdict the court rendered a judgment against appellant. Appellant filed grounds and moved the court to set aside the verdict and judgment, and to grant it a new trial, which motion was overruled and exceptions taken, and an appeal prayed to this court. Upon this trial all of the instructions, including the one which had been given on the former trial at the instance of appellant, were given upon the motion of the appellee, and to all of which the appellant objected and excepted.

In its grounds for a new trial the appellant assigned as errors the rulings of the court upon the admission of testimony and rejection of testimony; and the refusal of the court to instruct the jury to peremptorily find for the defendant; and the giving of instructions one, three, four, and five; and the refusal of the court to give an instruction offered by appellant; and because the verdict was against the weight of the evidence, and excessive; but its counsel here only insists that the court erred to its prejudice in the admission of incompetent evidence against it upon the trial, and in the giving of instruction number four, and that the verdict of the jury was excessive.

So far as the refusal of the trial court to peremptorily instruct the jury to find for the defendant, and so far as the giving of instructions one, two, three, and four are concerned, they are matters *res adjudicata*. L. & N. R. Co. v. Henen, 16 R., 31. Upon the first trial of the case in the circuit court the appellant objected to the giving of instructions one, two, three, and five, as stated above, and saved exception to the rulings of the court overruling his objections, and in his grounds for a new trial he assigned the giving of instructions one, two, three, and five as errors, and also the refusal of the court to grant a peremptory instruction to find for it was assigned as error.

The appellee upon the first trial objected to the giving of instruction number four, now complained of by the appellant, and, to the ruling of the court giving the instruction, saved an exception.

This court said in the case of *Dinkelspiel v. Central Kentucky Asylum for Insane, et al.*, 73 S. W., 771:

"That all questions raised on the former appeal, and that were in the record, and might have been presented, must be construed as having been adjudicated." That was a case which had been before this court upon a former appeal, as this one.

In the case of *Williams v. Rogers*, 14 Bush, 776, upon a second appeal to this court, the appellant undertook to raise the question of the sufficiency of the petition, and this court said:

"The question of the sufficiency of the petition can not be inquired into, as this was necessarily passed upon on the first appeal; although not adverted to in the opinion, appellant is precluded from again raising the question."

On the former appeal of this case the judgment was reversed and cause remanded for a new trial consistent with the opinion.

In the case of *Davis v. McCorkle*, 77 Ky., 746, this court said: "With a view to the convenient dispatch of business, the speedy settlement of disputes, and the repose of society, courts long since established the rule that when a matter is once put in issue, and is passed upon by a court of competent jurisdiction, it cannot be again litigated by the same parties so long as the former decision continues in force." And this rule applies not only to the point upon which the court was asked to form an opinion and pronounce judgment, but to every question in the record properly brought before the court.

The evidence upon the last trial of this case in the circuit court is substantially the same as the evidence upon the first trial. From the reasons given above, it seems that the appellant is now precluded from again bringing into controversy the propriety of the ruling of the court below in overruling its motion for a peremptory instruction to the jury to find for it, and also the sufficiency and propriety of the giving of instructions one, two, three, and four. The defect in instruction number five, on account of which the first judgment in this case was reversed on the first appeal, was given on

the last trial as directed in the opinion of this court on the former appeal. For the reasons stated above the appellant cannot now be heard to complain of the giving of instruction number four, since it was given by the court on the first trial of this case, upon the motion of the appellant, and over the objection of the appellee, and for the further reason that it was before this court on the former appeal, and, although not directly adverted to in the opinion, it must be considered as having been approved by the court; besides, taking instructions number four and number five together, we do not think that the jury could have been misled as to the proper degree of care that was necessary to be exercised by the appellee under the circumstances of this case.

The appellant on the trial of this case below, from the result of which the present appeal is now pending, offered and moved the court to give an instruction denominated "X" in the transcript, and complaint is made that the court was in error by the failure to give that instruction. This same instruction was offered and refused on the first trial of this case, as appears from the transcript of that trial, and is, upon this appeal, to be considered a matter *res adjudicata*, and appellant is precluded from complaint in regard to it now.

The appellant complains that, over his objection, incompetent testimony was permitted by the court to go to the jury, and he did not have a fair trial upon that account. The testimony complained of was certain statements given by Dr. John G. Tye and Dr. Tilman Ramsey for the appellee. As far as relates to the testimony of Dr. John G. Tye, it was given by a deposition and was the same exactly upon each trial. The same objection was made to it upon the former trial as upon the latter, and the opinion of this court on the former appeal precludes the appellant from complaining of it now. These witnesses are two physicians, both of whom had examined the body of the appellee, and were asked hypothetical questions as expert witnesses upon each of the trials. The complaint made by appellant is, that these questions were so framed, and answers were so given, as made it appear that the answers were not opinions, but were evidence tending to show that the actual injuries complained of by appellee were facts, and as to whether or not the things complained of by ap-

pellee were facts or not, was a question in issue before the jury. A careful examination of the evidence and answers made by these witnesses shows very clearly what part of their testimony related to the matters within their personal knowledge and what portions of it were opinions given by them as experts upon the hypothetical questions propounded to them. We do not see how the jury could have been misled by anything said by either of them indicating that they stated as facts anything except matters which were within their personal knowledge. The matters about which hypothetical questions were propounded to them were matters about which it was competent to propound such hypothetical questions, and as they qualified themselves as experts upon those subjects, the opinions given were competent to be heard by the jury.

The appellant makes further complaint that the appellee was allowed to introduce witnesses in rebuttal who gave evidence in chief, over the objection of the appellant, and that this was prejudicial to its rights. An examination of this evidence, however, shows that appellant's contention upon that subject is entirely without merit. The evidence complained of, considering the evidence offered upon the trial by the appellant, was purely in rebuttal, and while some statements made by these witnesses was a matter which might have been properly given as evidence in chief, the admission and rejection of this evidence was a thing within the sound discretion of the trial court, and, in the case at bar, it does not appear to us that the trial court abused its discretion in that regard.

The verdict for \$7,334.00 in favor of appellee is complained of as being excessive, but we are not able to say that it is in excess of the damages sustained by him.

In the case of *L. & N. R. R. Co. v. Mitchell*, 87 Ky., 327, in which case it was complained that the amount of damages allowed was excessive, this court said:

"The amount allowed seems large. It is so. The fact, however, that it appears high to us does not authorize a reversal. We are not acting as a jury, and it is only when it is glaringly excessive, and appears at first blush to have resulted from passion or prejudice, that we can interfere. The power should be sparingly exercised, and only in extreme cases. This is the policy

of the law, and reasonably and necessarily so. It is difficult, indeed impossible, to measure with mathematical certainty the extent of some of the elements of compensatory damages. The law has confided the duty to the opinion of the jury as the best means of arriving at their extent even approximately, and every verdict should be regarded, *prima facie*, as the result of the exercise of an honest judgment upon their part."

The rule adopted in this jurisdiction is, that a new trial will not be granted because of excessive damages unless the damages allowed are so great and disproportionate to the injury received as to strike the mind at first blush as having resulted from passion or prejudice on the part of the jury.

Sub-section 4, of Section 340, of the Civil Code, restricts the court from interfering with the verdict of the jury on account of the amount of the damages allowed, to such cases wherein it appears that the damages allowed were given under the influence of passion or prejudice.

There was evidence before the jury which conduced to show that the piece of slate, which fell from the roof of the mine, a distance of six or seven feet, was probably five feet in length, two and one-half feet in width, six to eight inches thick in the center, and sloping to a feather edge at the sides, and that from the force of the blow upon appellee's back he was crushed down to the ground, and had to be assisted out of the mine by two men, one holding him under either arm, and that the physician who was immediately called to see him found several sections of his backbone projecting, and thought it necessary to give him the heroic treatment of having two men suspend him, one holding him under either arm, and one pulling down by his feet for the purpose of causing the sections of the backbone to readjust themselves; and a further effort was made by the physician to accomplish this purpose by removing the clothing of appellee and laying him upon a cot, face downwards, and the surgeon placed his knee against the projections in the backbone, and, taking the appellee by the shoulders, pulled him upwards, at the same time pressing with his knee upon the projecting sections of the backbone. There is also evidence conducing to show that the spinous processes of this section of the backbone were broken down and that the muscles of the back on either side of

the backbone have become rigid and hardened from this injury; that the lower limbs of appellee had become benumbed to some extent, which was attributed to a pressure upon the spinal cord, resulting from this injury.

There was also evidence conducing to show that the weight of appellee had been reduced by reason of this injury from nearly one hundred and fifty pounds, at the time of the injury, to one hundred and twenty-four pounds, at the time of the trial; that he suffered a great deal from the disarrangement of the proper action of his kidneys and bowels, and other things he suffered, which his evidence attributed to the result of the injury, and, among other things, that previous to and at the time of the injury he was a stout man, and able to earn some four or five dollars per day at his occupation as a miner, and that since that time he was entirely incapacitated from doing any kind of physical labor, and was stooped in his person, and incapacitated from riding horseback, all of which things he attributed, and his evidence conduces to show, were the direct and proximate result of the injury received by him.

While there was evidence from appellant contradicting this evidence for the appellee in a good many details, the jury heard the evidence and were the judges of its credibility, and, besides, the appellee, with his clothing removed, was exhibited to the jury, who had a view of his person where the injury was received upon his body. If the jury believed the evidence for the plaintiff, they had a sufficiency upon which they could base their verdict as to all of the questions in the case, and we see no reason to indicate that their verdict, as to the amount of it, was the result of passion or prejudice, and at first blush it is not glaringly disproportionate to the injury, according to the evidence in this case.

Upon the whole case, we are of the opinion that the appellant had a fair trial, and the judgment is affirmed.

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### **Ellswick v. Yellow Poplar Lumber Company.**

(Decided January 29, 1915.)

#### **Appeal from Pike Circuit Court.**

1. **Contracts—Sale of Timber—Action to Enforce.—Where a contract for the sale of certain trees provided that they were to**



be inspected and branded by the purchaser's agents, the fact that such agents inspected and branded a greater number of trees than the contract called for imposed no liability on the purchaser other than that called for by the contract.

2. **Contracts—Sale of Timber—Finding of Chancellor—Evidence.**—Evidence held to sustain the finding of the chancellor fixing the number of trees covered by a contract for the sale of timber.
3. **Action—Costs.**—Where plaintiff recovered on every substantial phase of the case, defendant cannot complain that he was required to pay half the costs.
4. **Contracts—Certainty—Specific Performance—Evidence.**—Where a contract for the sale of certain trees provided that payment therefor was to be made upon inspection and branding of the trees by the purchaser's agents, and the delivery of a warranty deed conveying certain rights and privileges in connection with the removal of the timber, evidence examined, and held that, the number of trees embraced in the contract being accurately fixed, the chancellor did not err in decreeing specific performance of the terms of the contract.

STRATTON & STEVENSON and J. S. CLINE for appellant.

J. M. YORK for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.**

K. B. Ellswick was the owner of the timber on two tracts of land, one containing 1,000 acres, located in Pike county, Kentucky, and the other containing about 50 acres, and located in Buchanan county, Virginia. On April 16, 1912, he, by written contract, sold to the Yellow Poplar Lumber Company all the timber of certain specified varieties on the two tracts referred to that were not less than eighteen inches in diameter inside the bark, stump high. The trees were to be inspected and branded by representatives of the lumber company, and were to be paid for at the price of \$1.50 a tree, on completion of the inspection and branding, and on delivery of a general warranty deed conveying certain rights and privileges in connection with the removal of the timber.

The lumber company paid \$2,500 on the purchase price. It claimed that only 5,319 trees passed under the contract, and that the amount of the purchase price at \$1.50 a tree, was \$7,978.50. It then tendered to Ellswick the balance of the purchase price, amounting to \$5,478.50. Ellswick refused to accept this sum or to make a deed in accordance with the contract. Thereupon, the lumber company brought this action for specific perform-

ance. During the progress of the action the master commissioner was directed to go upon the land and ascertain and report the number of trees that were within the contract. He fixed the number at 5,489. Each side excepted to the report, but the exceptions were overruled. On final hearing specific performance was decreed, and Ellswick given a judgment for \$8,233.50, subject to a credit of \$2,500 paid August 27, 1912, the judgment to become effective on the delivery of the warranty deed to the lumber company in accordance with the terms of the contract, the cost to be equally divided between the parties. Ellswick appeals.

There was proof to the effect that certain representatives of the lumber company actually branded a number of trees not only in excess of the number claimed as correct by the lumber company, for which a tender was made, but also largely in excess of the number fixed by the report of the commissioner, and it is claimed that the title thereto necessarily passed under the contract. In other words, it is insisted that the lumber company is absolutely concluded by the action of its agents, and that it should pay for the number of trees inspected and branded by them, even though the trees did not come within the specifications provided in the contract. This contention cannot be sustained. No trees other than those specified in the contract were sold. The lumber company's manager instructed its agents to brand only such trees as were eighteen inches in diameter inside the bark, stump high. They were not authorized to brand any other trees. The mere fact that they, through fraud or error of judgment, branded trees other than those they were authorized to brand in no way affected the rights of the parties to the contract. Suppose, for instance, the trees had been sold for a lump sum. Could it be successfully contended that Ellswick should be deprived of timber not included in the contract merely because the company's representatives branded such timber? We think not; and for the same reason no liability other than that imposed by the contract should be imposed on the lumber company merely because its agents branded trees not covered by the contract. As the contract specifies the trees that were sold, the rights of the parties thereunder depend upon its terms, and not on the unauthorized acts of the agents of either. Since only those trees described in the contract were sold by Ells-

wick and purchased by the lumber company, and as no satisfactory reason is shown for changing the number reported by the commissioner and approved by the chancellor, we see no reason for disturbing the judgment on this branch of the case.

The court did not err in giving judgment without interest except from the date of the judgment. The trees were not to be paid for until after they were inspected and branded and the deed was delivered to the lumber company, and no deed was ever tendered prior to the bringing of the action.

It is next insisted that no costs should have been adjudged against Ellswick, because the court added 170 trees to the number which the lumber company offered to pay for, and to this extent he was successful in the action. As before stated, however, Ellswick never offered to comply with the contract, either on the basis of the offer made by the lumber company, or on any other basis. To enforce its rights the lumber company was compelled to bring suit. It succeeded in recovering on every substantial phase of the case. Under these circumstances, Ellswick might with propriety have been required to pay the entire cost. He cannot, therefore, complain that he was required to pay only one-half of the cost.

Lastly, it is insisted that because the lumber company's agents branded trees other than those specified in the contract, and thus created a confusion as to the number of trees, specific performance should be denied. As a matter of fact, however, there is no confusion. The trees that came within the specifications are still standing. Their number was a matter of easy ascertainment. All that was necessary was to inspect and count them. This service was accurately performed by the commissioner and his assistants. Their number being accurately fixed, and the subject matter of the action being thus clearly defined, notwithstanding the alleged confusion, specific performance was properly decreed.

Judgment affirmed.

**Holman, et al. v. Parsons.**

(Decided February 2, 1915.)

**Appeal from Mercer Circuit Court.**

1. **Forcible Entry and Detainer—Possession—Title.**—A proceeding of forcible entry involves only the possession of land; the title thereto is not involved in any way.
2. **Forcible Entry and Detainer.**—One who enters upon land in the actual possession of another, without his consent, may be removed by a writ of forcible entry and detainer though the right of entry was in him, and an action instituted by him involving the title and right of possession was pending.
3. **Forcible Entry and Detainer—Evidence—Possession.**—In a forcible entry proceeding the plaintiff having the paper title may put his deed in evidence to show the extent of his possession.

E. H. GAITHER for appellants.

C. E. RANKIN for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—Affirming.**

This is a proceeding of forcible entry begun by appellee, Sarah J. Parsons, against Joe Holman and the other appellants, in the Mercer County Court, and finally tried in the Mercer Circuit Court. The judgment in each court was favorable to the appellee. The defendants appealed.

Appellant, Joe Holman, is the only child of Lettie Owens, now deceased; the other appellants are the sons of Joe Holman.

Mrs. Owens owned a house and lot in McAfee, Mercer county. She lived in part of the house and rented the other portion of it to a family named Smith. That portion occupied by Mrs. Owens was furnished and consisted of two bed rooms, a dining room and a kitchen. The upper part of the house was furnished by her tenants, with the exception of one room that Mrs. Owens reserved as a storeroom.

About the last of December, 1913, leaving her tenants in possession of the house and lot in McAfee, Mrs. Owens was taken by her grandchildren to Oregon, a village seven miles distant, for a visit. She was very old and quite feeble; and, in addition to these infirmities, she was suffering from an injury to her hand that was

developing blood poisoning, and ultimately caused her death.

After Mrs. Owens had remained in Oregon about a week, she became restless and requested her granddaughters to take her back to McAfee, which they did, one driving her grandmother in her own buggy, and the other granddaughter following in another buggy to take her sister back home. The girls were mere children.

Before leaving Oregon, it was understood by Mrs. Owens and her son, Joe Holman, that as soon as one of his boys returned from taking a load of tobacco to Lexington he would go to his grandmother's house, in McAfee, and live with her as he had theretofore done, and take care of her stock, which consisted of a cow and a horse. When Mrs. Owens reached home it was discovered that her tenants had deserted the premises; and, as the children who had accompanied her were not prepared to remain, one of them procured the services of the appellee, Sarah Jane Parsons, to take care of Mrs. Owens until her son Joe could be notified of the situation. This occurred on a Saturday. On the next day Joe Holman arrived at his mother's house in McAfee and found her quite ill, and attended by Mrs. Parsons, who continued in attendance at the suggestion of Holman. Mrs. Parsons took charge of the premises, keeping house for herself and Mrs. Owens.

On Monday Holman was called by a business engagement to a different part of the county and did not return until Thursday. On the same day two of the Holman boys came to their grandmother's house, at McAfee, to live with their grandmother, in accordance with the arrangement above referred to. Holman and his children occupied a part of the house; and, after taking one meal with Mrs. Parsons, they commenced housekeeping. The next day the boys' sister arrived and took charge of their part of the house.

On Saturday, January 5, 1914, Mrs. Owens died. She was buried on Sunday; and on Monday Mrs. Parsons produced a deed which had been signed by Mrs. Owens on the previous Monday, conveying to her the house and lot in McAfee in which they were then living. The consideration recited in the deed was the undertaking of Mrs. Parsons to board and nurse Mrs. Owens for the rest of her life. Mrs. Parsons demanded possession of

that portion of the house occupied by the Holmans, and, upon the refusal of Holman and his boys to surrender, she ejected them by means of a forcible detainer, as above stated.

These facts having been shown, the court instructed the jury to find for the plaintiff, Mrs. Parsons, if they believed from the evidence that she was in the actual possession of the property in question at the time the defendants entered it; and that it was immaterial how she obtained that possession.

Appellants insist that the proof did not warrant this instruction, since it did not show that Mrs. Parsons ever had actual possession of the property.

The proceeding of forcible entry involved only the possession of the land; the title thereto was not involved in any way. It matters not how one gains possession of land; he is entitled to hold it until ousted by proper legal proceedings.

In *Young v. Young*, 109 Ky., 123, the court said:

"One who enters upon land in the actual possession of another, without his consent, may be removed by a writ of forcible entry and detainer, though the right of entry was in him, and an action instituted by him involving the title and right of possession pending."

Sub-section 1 of Section 452 of the Civil Code of Practice defines a forcible entry to be "an entry without the consent of the person having the actual possession."

There is, therefore, no question here except that of possession. And, although it may develop later, in some other proceeding, that the deed to appellee was without consideration, or a lack of mental capacity may be shown, that is an entirely different matter, and is not open for adjudication in this action. *McCormick v. McDowell*, 121 Ky., 832; *Engle v. Tennis Coal Co.*, 125 Ky., 239.

Appellee offered her deed in evidence to show the extent of her possession, and it was properly admitted for that purpose. *Willis v. Whayne*, 142 Ky., 194.

But there was other evidence tending to show that Mrs. Parsons was in possession of the property as owner at the time the forcible entry was made. It is true this claim by Mrs. Parsons was controverted by the appellants, but it was for the jury to determine the issue between them.

As the instruction rested the case upon the actual possession of the property by Mrs. Parsons at the time

the appellants entered upon it, it properly gave the law of the case; and there being evidence to sustain the verdict, it will not be disturbed.

Judgment affirmed.

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### **Pace's Trustee v. Pace, et al.**

(Decided February 2, 1915.)

#### **Appeal from Calloway Circuit Court.**

1. **Fraudulent Conveyances—Transfers and Transactions Invalid.**—A conveyance without consideration is void as to existing liabilities, but not as to debts subsequently created.
2. **Fraudulent Conveyances—Remedies of Creditors and Purchasers—Persons Entitled to Assert Invalidity.**—Only persons who are prejudiced by a conveyance alleged to be fraudulent may call its validity into question; and the party claiming under such conveyance may impeach the claim of the attacking creditor and interpose any defense, including a plea of the statute of limitations, which the grantor himself might have invoked in a direct action upon the claim; the effect of such defenses when interposed by the grantee being to deny prejudice to the attacking creditor resulting from the conveyance sought to be invalidated.

J. R. GROGAN and A. D. THOMPSON for appellant.

JOHN RYAN for appellees.

#### **OPINION OF THE COURT BY JUDGE HANNAH—Affirming.**

In 1905 H. H. Pace bought a tract of land in Calloway county, and in 1908 he conveyed it to his wife, M. E. Pace.

Subsequently, in 1909, 1910, and 1911, Pace became involved in financial difficulties, and, in 1912, he filed a petition in bankruptcy, and was duly adjudicated a bankrupt.

The trustee of the estate of H. H. Pace in bankruptcy instituted this action in the Calloway Circuit Court against Mrs. Pace and the bankrupt, seeking to subject the tract of land mentioned to the payment of Pace's obligations. At the August term, 1913, the court rendered a judgment declaring the conveyance made by Pace to his wife in 1908 only constructively fraudulent and holding it valid as against obligations incurred after its execution, but that being without consider-

ation, it was invalid as against obligations created prior to its execution. The court directed the parties to take proof relative to, and ascertain the obligations of, Pace existing in 1908 when the conveyance was executed.

It was then shown that, while living in Tennessee, in 1898, Pace had contracted two debts: (1) a note of \$106.05, executed May 23, 1898, and an open account for \$11.04, due November 28, 1898; and these were all the debts Pace owed at the time he conveyed the land to his wife. These claims had been filed and allowed in the bankruptcy proceeding, and when filed herein the defendants pleaded the Tennessee limitation of six years.

The court held this plea sufficient and adjudged that the petition be dismissed, and the plaintiff appeals.

1. Appellant trustee contends that neither Pace nor his wife had a right to invoke the statute of limitations as a defense against the attack upon the conveyance made by Pace to Mrs. Pace.

As to Pace, appellant contends that, having failed to interpose a plea of the statute when proof of claim was filed by the Tennessee creditor in the bankruptcy proceeding, he will not be permitted to do so in this action.

It has been held that a claim barred by the statute of limitations is not a provable claim within the purview of the Act of Congress relating to bankruptcy. 94 Fed., 353; 95 Fed., 804. And it has also been held that it is the duty of the trustee to plead the statute in behalf of the other creditors. 94 Fed., 353; 118 Fed., 670. But, whether it was the duty of the bankrupt or of his trustee to have filed exceptions to such claim when presented, and whether the bankrupt, having failed to file such exceptions in the bankruptcy proceeding, is estopped from interposing such plea in the present action, is here unnecessary to be considered, for Mrs. Pace as grantee in the deed attacked as fraudulent had an unquestioned right to invoke the statute of limitations in respect of the antecedent liabilities of the grantor, as a defense to the action, in so far as it affected her.

2. The conveyance from Pace to his wife, as the trial court properly held, was voidable only as against any debts which the grantor owed at the time of the execution of the conveyance. *Dugan's Ex'x v. Daugherty*, 146 Ky., 187, 142 S. W., 242. This is the rule where the conveyance is without consideration, but not actually fraudulent.



3. In *Yeend v. Weeks*, 104 Ala., 331, 16 So., 165, 53 A. S. R., 50, the court said:

"Only those persons whose rights are interfered with, who are injured by conveyances alleged to be fraudulent, have the right to interfere to set them aside. When one aggrieved by such a conveyance calls its validity in question, and moves to set it aside, the parties claiming under the gift or conveyance may dispute his claim by demanding that he shall prove himself to be a creditor of the grantor or donor, with a valid, subsisting debt against him."

That the grantee in a conveyance attacked as fraudulent may impeach the pursuing creditor's claim or judgment and interpose any defense which the debtor himself could have invoked in a direct suit against him upon the claim, including the defense of the statute of limitations, has been established in the following authorities: *Davis v. Davis*, 20 Ore., 78, 25 Pac., 140; *Miller v. Miller*, 23 Me., 22, 39 A. D., 597; *Battle v. Reid*, 68 Ala., 149; *Lovell v. Hutchinson*, 106 Ala., 417, 17 So., 623; *Ward v. Waterman*, 85 Cal., 488, 24 Pac., 930; *Hill v. Hilliard*, 103 N. C., 34, 488, 9 S. E., 639; *McClenney v. McClenney*, 3 Tex., 192, 49 A. D., 738; *Harper v. Raisin Fertilizer Company*, 158 Ala., 329, 48 So., 589, 132 A. S. R., 32; 20 Cyc., 428. See *Gregory v. Lamb*, 101 Ky., 727.

When the statute of limitations is invoked by the grantee in a conveyance attacked as fraudulent, the plea operates to deny that any prejudice resulted to the pursuing creditor by reason of the execution of the conveyance, and thereby challenges his right to attack it.

The plea of the statute of limitations invoked by Mrs. Pace being valid, there remained no liabilities as against which the conveyance to her was fraudulent, and the trial court properly dismissed the petition.

Judgment affirmed.

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### **Bates, et al. v. Northern Coal & Coke Company.**

(Decided February 2, 1915.)

#### **Appeal from Letcher Circuit Court.**

**Appeal—Subsequent Appeals—Former Decision as Law of the Case in General.**—The decision of the Court of Appeals upon appeal is the law of the case; and upon a subsequent appeal thereof,

the principles announced in the former opinion are not open to reargument. The opinion on former appeal is controlling upon the Court of Appeals to the same extent as it binds the trial court on remand.

R. O. BRASHEARS for appellants.

SMITH & COMBS for appellee.

**OPINION OF THE COURT BY JUDGE HANNAH—Affirming.**

This is an action instituted in the Letcher Circuit Court to enforce the specific performance of a contract for the sale and conveyance of the coal under a farm in Letcher county owned by W. J. Bates.

There was a judgment denying the relief sought, and the plaintiff, Northern Coal & Coke Company, appealed therefrom. Upon appeal the judgment was reversed with instructions to enter a judgment specifically enforcing the contract. See *Northern Coal & Coke Company v. Bates*, 146 Ky., 624.

Upon the return of the case to the trial court, the original judgment was set aside, and the trial court rendered and entered a judgment in conformity with the mandate and opinion of this court. From that judgment the defendants appeal.

The contentions presented by the appellants herein are in the nature of criticisms of the propriety of the rulings of this court upon the former appeal rather than of the judgment which, upon remand of the case, was rendered and entered by the trial court in obedience to the mandate, and which judgment is now appealed from.

The decision of this court upon appeal is the law of the case; and upon a subsequent appeal the principles announced in the former opinion are not open for reargument. The opinion upon the former appeal controls this court upon a subsequent appeal of the case to the same extent as it binds the trial court on remand. *Sanders v. Herndon*, 128 Ky., 347, 32 R., 1362, 108 S. W., 908; *White v. Ayer*, 116 S. W., 349; *Foster-Milburn Co. v. Chinn*, 137 Ky., 834, 127 S. W., 476; *L. & N. v. O'Nan's Admr.*, 119 S. W., 1192.

The judgment which was entered upon remand of the case decreeing specific performance of the contract conforms to the opinion of the court on the former appeal.

There was no objection saved by appellants to and is now no appeal from the proceedings subsequently

had in the trial court in pursuance to and in execution of the judgment decreeing specific performance; but they appear in the record, and we have examined them. They appear to have been regular and in conformity to approved principles of procedure. In fact, appellants present no specific objection in respect thereof, and complain only of the judgment rendered and entered upon remand.

That judgment being in conformity to the opinion on the former appeal, the door is closed to a further entertainment of the questions then considered.

Affirmed.

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### **Snively's Trustee, et al. v. Snively.**

(Decided February 2, 1915.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, Second Division).

1. **Wills—Construction of—Life Estate.**—Where a testatrix devised to her granddaughter, in trust, a portion of her estate, with the provision that "all the balance of said portion to be paid over to the Louisville Trust Company and held by said company in trust for the use and benefit of Ella Bull Snively during her life, with power to dispose of same by her last will and testament," this gave to the devisee a life estate, with the power of disposition, and not the fee in the estate covered by the devise.
2. **Wills—Construction of—Life Estate—Power of Disposition.**—When the estate is devised for life, either expressly or by necessary inference gathered from the intention of the testator as expressed in the will, the power of disposition in the devisee will not convert the estate into a fee; but if the devise does not specifically or by necessary inference create a life estate, the power of disposition invests the devisee with the fee, and these rules apply with equal force whether the estate is given immediately to the devisee or placed in the custody of a trustee for his benefit.

RANDOLPH H. BLAIN for appellants.

McDERMOTT & Ray for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Mrs. Mary Bull, in the second and third clauses of her last will, provided as follows:

"Item Second. I hereby direct my executor to convey or cause to be conveyed to the Louisville Trust Company, trustee, for the use and benefit of my daughter, Mary D. Creamer, my house and lot and all of the household and kitchen furniture therein, being No. 2440 Park Place, Louisville, Kentucky, for and during the life of my said daughter, Mary D. Creamer, usually known as Mary D. Snively, and the remainder, at her death, to be held by the Louisville Trust Company in trust for my said granddaughter, Ella Bull Snively, with full power to my said granddaughter, Ella Bull Snively, to dispose of said real estate by her last will and testament, and the said Louisville Trust Company shall keep all taxes, insurance and repairs on said real estate paid.

"Item Third. I direct my executor to pay to the Louisville Trust Company, in trust for my granddaughter, Ella Bull Snively, the net amount of my policy in the Equitable Life Insurance Company, amounting to about \$5,000. The same to be held by the Louisville Trust Company for my granddaughter, she to receive the net income from same until she is thirty years of age, at which time she is to receive the principal sum free of trust."

In the fourth clause the testatrix directed that the remainder of her estate be divided into three parts, one portion going to Robert F. Bull, another to Mrs. Creamer and her children, and the other to Edward Bull's children.

In the fifth paragraph she provided that "I direct my executor to dispose of the second portion above referred to as follows: To pay to my daughter, Ella G. Sevier, the sum of two thousand dollars in cash, to my daughter, Mary D. Snively-Creamer, the sum of five hundred dollars cash, and to my grandson, John Bull Snively, two hundred dollars. These amounts to be paid as soon after my death as practicable.

"All the balance of said portion to be paid over to the Louisville Trust Company and held by said company in trust for the use and benefit of Ella Bull Snively during her life, with power to dispose of same by her last will and testament."

And in a codicil she made this provision: "Having bequeathed to my grandchild, Ella Bull Snively, a life interest in my present residence, No. 2440 Park avenue, after the death of her mother, Mrs. Mary D. Snively,

it is my will that said Item Two of the above will be amended as follows, to-wit:

"That if my said grandchild, Ella Bull Snively, should leave any children, this house and lot shall descend to said children upon her death. If she should leave no children surviving her, she may dispose of the same by last will and testament to any of my descendants, but she shall have no right to dispose of the said house and lot to strangers or any other persons other than some of my lineal descendants."

In the division of the property as directed in clause four, there was paid to the Louisville Trust Company, as trustee of Ella Bull Snively, \$5,650. Some time after this division and payment Ella Bull Snively, in the litigation pending about the settlement of the estate, asserted, in a pleading filed for that purpose, the claim that under the will she was entitled to the property described in clause five of the will in fee simple, and she asked that the trustee be required to deliver the same to her free of any trust.

The question at issue coming up on a demurrer to the pleading of Ella Bull Snively, the chancellor held that she took the fee in this estate and entered a judgment that "all the property, including money, notes, bonds, securities and choses in action now held by the Louisville Trust Company as trustee for the said Ella Bull Snively under item five of the will of said Mary A. Bull rightfully belongs to said Ella Bull Snively, unconditionally, absolutely, and in fee simple, and that the trust in said Louisville Trust Company under said will was a dry trust and not enforceable, and that the said Ella Bull Snively recover of the Louisville Trust Company, trustee, free of said trust, all money, notes, bonds, stocks, and choses in action now held by said Trust Company in trust for her; to have and to hold in fee simple and free of any trust."

Complaining of this judgment, the Trust Company prosecutes this appeal, insisting that under the will Ella Bull Snively took only a life estate in the property described in clause five, with power to dispose of the same by her last will and testament.

It will be observed that there is no devise over after the death of Ella Bull Snively, and therefore it is further insisted by counsel for appellant that if she should die without having disposed of her property by her last will

and testament, the estate would vest in the legal heirs of the testatrix, and, consequently, having a contingent interest in this estate, these heirs were necessary parties to this suit.

This alleged defect in parties is not, however, very material, because if the estate was left in the hands of the trustee and Ella Bull Snively took only a life estate and did not dispose of it by will, it would go to these heirs, and if she took the fee, that would dispose of the interest of the heirs, and so the issue raised by the trustees presents fully every defense to the claim of Ella Bull Snively that could have been presented if the heirs had been made parties.

The real question in the case is, did Ella Bull Snively take a fee or only a life estate with power of disposition?

It would appear from the reading of clause five that the testatrix intended to do two things in respect to the estate given to Ella Bull Snively, namely, to give her the use and benefit of the fund during her life, and also the power to dispose of it by will. This is the ordinary and natural meaning that we think should be given to the words used by the testatrix in the last paragraph of this clause. There is no substantial difference in respect to the title vested in Ella Bull Snively by clause two and clause five. One of these clauses relates to real property and one to personal estate, but in each of them it is provided that the estate given should be held in trust for Ella Bull Snively with power to dispose of the same by will. It is true that in clause two the trustee is directed to keep all taxes, insurance and repairs paid on the real property therein disposed of, while in clause five there is no particular direction given to the trustee describing its control over the property or its duties. But the fact that the trustee was directed in clause two to pay taxes, insurance and for repairs does not really add anything to either the duty or power of the trustee, because the law, in the absence of this direction, would impose the performance of these duties.

If the words "during her life" had not been inserted and clause five had read that the property was to be held "by said company in trust for the use and benefit of Ella Bull Snively, with power to dispose of same by her last will and testament," then the construction of this clause would be controlled by the rule announced in Con-

stantine v. Moore, 23 Ky. L. R., 369. In that case the will read:

"In consideration of the love and affection I have for my beloved wife, I give and bequeath unto her all my property I may die possessed of, of every description, real, personal and mixed, to have the same for her benefit, to control the same during her life as she may see proper, free from the claim of every person or persons, and to dispose of the same as she may see proper at her death." And the court said that the testator, having given the fee in the first of the clause, the words "to control the same during her life as she may see proper, free from the claim of every person or persons, and to dispose of the same as she may see proper at her death," were merely explanatory of the preceding part of the clause; that these words were not a qualification of the fee already given, but were added to make sure the preceding clause would not be misunderstood. But here the will expressly provides that the devisee shall only have the estate "during her life, with power to dispose of same by will."

In *Robbins v. Robbins*, 10 Ky. L. R., 209, the testator directed his executor to sell his Chicago property as soon as he thought advisable for the interest of his wife, and when sold directed "that he forthwith invest the proceeds of said sale in United States bonds, in the name of said wife, and for her benefit. She will, at no time, loan any of the proceeds of said sales of said real estate to any person or persons whatever, but is to have the interest on said bonds to use as she may desire." In another clause he directed that if the Chicago estate was not sold that the rents were to go to his wife to use as she might desire. In holding that the wife took the fee and not a life estate, the court said that it was manifest from the reading of the entire will that the testator's intention was to dispose of his whole estate, and there was no indication of any purpose on his part to limit the estate of his wife, there being no children, to a life estate.

The essential difference between that case and this lies in the fact that here the testatrix expressly provides that the devisee shall hold the estate "during her life."

The case of *Fristoe v. Laytham*, 18 Ky. L. R., 157, can hardly be regarded as authority for the proposition

asserted by counsel for appellee in this case, as it appears from the opinion that the parties interested in the construction of the will consented that it disposed of the fee and not a life estate.

In *Drye v. Cunningham*, Medley & Co., 24 Ky. L. R., 2500, the testator by his will gave certain property to his wife for life with remainder to his daughters, one of whom was Susan Tucker, and provided that the share of Susan Tucker should be placed in the hands of a trustee to manage and control the same and pay over to her annually the interest, and the court held that there being nothing in the will to indicate a purpose on the part of the testator to limit the estate of Mrs. Tucker in the property placed in the hands of the trustee to a life estate, and that she took the fee, saying: "The fund was placed in the hands of a trustee for its protection from her improvidence or that of her husband, but nothing further was provided. \* \* \* The creation of the trust did not change the character of the estate devised to Mrs. Tucker. It was her property, held in trust for her." A similar ruling was in effect made in *Reuling v. Reuling*, 137 Ky., 637.

In the case of *McCallister v. Bethel*, 97 Ky., 1, the question arose as to the proper construction of a clause in the will of Ben Talbot in which he devised certain property to John McCallister in trust for Joseph McCallister with the provision that if Joseph McCallister left surviving him no children it should go to any persons to whom Joseph might will it. Joseph died intestate and without children, and the court, in holding that he took the fee in the property devised, said:

"There is no expression or word used which requires the trustee to give Joseph the rents during his life, so as to indicate an intention upon the part of the testator that he was to have only a life estate in the land. It is perfectly manifest from the will that the testator knew how to create a life estate in a devisee. \* \* \* Had he intended that Joseph should only take a life estate in the farm, he would have said so, as he did in the case of his daughter. \* \* \* Having given Joseph the fee, it was wholly unnecessary for the testator to emphasize the fact by trying to confer upon him the right to will the farm to whomsoever he pleased. The right to so dispose of the farm was incident to the estate which the testator gave him, and no further words



were necessary to be employed to enable him to do so, unless he had bodily heirs."

In *Cropper v. Bowles*, 150 Ky., 393, the property in question was given to Mrs. Bowles "to be her sole and separate estate, free from the debts and control of her husband, or any husband she may ever have, with the right to dispose of same by last will and testament or writing in the nature thereof, but without power to mortgage or otherwise to encumber or to sell or convey the same during her life." The court held that Mrs. Bowles took the fee, and that the restraint upon the alienation of the estate was void; but it will be observed that here the grantor, without limitation, except in respect to the restraint on alienation referred to, conveyed the estate in fee, nowhere indicating a purpose that it should be for life.

Turning now to the other line of cases relied on in support of the proposition that under the will *Ella Bull Snively* took only a life estate in this fund, it appears that in *McCullough v. Anderson*, 90 Ky., 126, the testator devised his property to his wife in a clause reading, "To my most precious and well beloved wife I give, during her life, all my estate, real and personal, whether in possession or in action, with full and ample authority to dispose of the whole of it as she pleases. At her death, if she should not have previously made a testamentary distribution of all remaining undisposed of by her, I desire that such remainder shall be distributed as herein directed." On the death of the wife, who had not made any disposition of a large part of the estate, a controversy came up as to whether she took the fee or a life estate, and the court held that the wife took only a life estate with the power of disposition, which she had failed to exercise, laying down the general rule, that has since been consistently followed, that "if the estate is given or devised generally or indefinitely with power of disposition, it passes a fee, but when the devisor or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee and vested in him by the devisor or grantor. He is given a life estate in express terms, and the failure to exercise the power gives to the remainderman the fee, because no disposition having been made of it by the life tenant, he takes under the will or conveyance.

\* \* \* Now, if the testator had intended to vest the wife with the fee, or to give her the absolute estate, without any limitation, it could have been readily expressed, and there would have been no necessity for carving a life estate out of the fee, and then conferring upon the life tenant the power to pass the fee by deed or will, if she desired to do so. The provision of the will giving the wife this power shows that upon its exercise alone could the wife pass the fee, so as to defeat the objects of the testator's bounty, designated to take the remainder." *Payne v. Johnson*, 95 Ky., 175; *McCallister v. Bethel*, 97 Ky., 1.

Running through the many cases construing provisions in wills like the one here in question there will be found the distinction that when the estate is devised for life, either expressly or by necessary inference gathered from the intention of the testator as expressed in the will, the power of disposition in the devisee will not convert the estate into a fee, but, if the devisee does not specifically or by necessary inference create a life estate, the power of disposition invests the devisee with the fee, and these rules apply with equal force whether the estate is given immediately to the devisee or placed in the custody of a trustee for his benefit.

In this will we think the testatrix manifested very clearly her purpose to limit the estate to a life estate, or else she would not have used the words "during her life." If the testatrix had not intended to limit the estate to a life estate with the power of disposition, it is difficult to understand why these words were inserted in the will. That they were not used by inadvertence or mistake, or through ignorance of their meaning, is shown by the care with which the entire will was prepared and the clearness with which the testatrix disposed of her estate and the appropriateness of the words used in giving the fee and lesser estate to different devisees. The will provides in express terms that the trustee "shall hold the estate in trust for the use and benefit of Ella Bull Snively during her life," and if the estate should be taken out of the hands of the trustee and turned over to the devisee, this would be doing, as it seems to us, what the testatrix expressly directed should not be done.

This conclusion, which results in holding that Ella Bull Snively did not take the fee but only a life estate

with power of disposition, makes it unnecessary to consider the other question raised, that the will created what is known as a dry or passive trust.

Wherefore, the judgment is reversed, with directions to enter a judgment in conformity with this opinion.

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## **Illinois Central Railroad Company v. Scheible.**

(Decided February 2, 1915.)

### **Appeal from Hardin Circuit Court.**

1. **Railroads—Fires—Instructions.**—An instruction telling the jury that “they should find for the plaintiff if they believed from the evidence, either, that said engine was not equipped with the best or most approved screen or spark-arrester in practical use and in perfect order, or that the engine in question was operated by defendant’s agents, servants and employes in a careless and negligent manner, and thereby sparks from said engine were thrown upon the house which was burned, and set it upon fire and destroyed it,” was not objectionable.
2. **Railroads—Fires—Evidence.**—Direct evidence is not indispensable to a recovery in this class of cases. Circumstantial evidence is equally as sufficient as direct evidence would be when the circumstantial evidence connects the sparks from the passing train with the fire.

TRABUE, DOOLAN & COX and WILLIAMS & HANDLEY for appellant.

GEORGE HOLBERT and STANLEY A. BERRY for appellee.

### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

This is a suit to recover damages for the value of a house alleged to have been destroyed by fire started by sparks from one of the railroad company’s engines. There is nothing about the case to take it out of the usual class of cases of this character. The law controlling the rights and liabilities of the parties is so well settled that there was hardly any room for error to be committed, and so far as the law of the case is concerned no error prejudicial to the substantial rights of the railroad company appears in the record.

The court told the jury that “they should find for the plaintiff in this action if they believed from the

evidence, either, that said engine was not equipped with the best or most approved screen or spark arrester in practical use and in perfect order, or that the engine in question was operated by defendant's agents, servants and employes, then in charge of it, in a careless and negligent manner, and thereby a spark or sparks from said engine was thrown upon the house which was burned, and set fire to said house, thereby destroying same."

This instruction is criticised because it put upon the railroad company the duty of using the best or most approved screens or spark arresters in practical use and in perfect working order. The instruction given is the one that was approved by this court in *C. & O. Ry. Co. v. Richardson*, 99 S. W., 642, 30 Ky. L. R., 786.

In *L. & N. R. R. Co. v. Guttman*, 148 Ky., 235, an instruction telling the jury that it was the duty of the railroad company "to furnish its engines with the best screens or spark arresters known to science in practical use for preventing the escape of sparks," was approved, and there is no substantial difference between the two instructions. The wording is different, but the idea in both of them is the same, as each of them put on the company the duty of equipping its engines with the best screens or spark arresters in practical use.

The use of the words "and in perfect order" is criticised, but we do not think this criticism is well founded. It is as much the duty of the company to keep its screens in order as it is to use the best or most approved type, and if the screen is the best or most approved screen in practical use, this would necessarily imply that it was in perfect order, for, if it was not in such order, it would not be the best or most approved screen in practical use.

The principal grounds relied on for reversal are that the evidence did not show that the fire started from a spark that escaped from an engine, or that the train was carelessly or negligently handled or operated, or that the engine was not equipped with the kind of spark arrester required.

The evidence shows that the house that was destroyed was situated some 80 or 90 feet from the track; that the weather was dry and the wind blowing from the track in the direction of the house; that the fire was discovered in the roof of the house about twenty minutes after the engine passed that it is charged set the house on fire; that the fire was discovered shortly after nine o'clock

and there had been no fire of any kind about the house that morning except a small wood fire that was made in the stove between six and seven o'clock for the purpose of getting breakfast, and which had died out about seven o'clock, or very soon after breakfast was over. There was also evidence that this engine and other engines had been throwing out live sparks within a few days previous to this and that these sparks had set fire to grass and weeds in the vicinity of the house that was burned.

There is no direct evidence that sparks from the engine of the train that passed a few minutes before the fire was discovered set the house on fire, but direct evidence is not indispensable to a recovery in this class of cases. Circumstantial evidence is equally as sufficient as direct evidence would be when the circumstantial evidence connects the sparks from the passing train with the fire. It would be an exceedingly difficult and in many cases an impossible thing for the owner of property destroyed by fire to show by direct and positive evidence that the fire was started by sparks from a passing engine. In the night time live sparks falling from engines are very discernible, but in the day time live sparks, although of sufficient heat to set fire to dry material, cannot well be seen by the naked eye as they come from the smoke-stack of the engine, and yet in many cases, including this one, circumstantial evidence leaves little room for doubt as to the origin of the fire.

Several witnesses, who were in or about the house at all times during the morning of the fire and preceding it, testified very clearly and directly and without contradiction that there was no fire in or about the house from which the fire that destroyed it could have been started. Accepting as true the statements of these witnesses, as the jury had a right to do, and as we may well assume they did, it is apparent that the fire must have originated from some outside source, and under the evidence there was only one source from which it could have started, and that was this passing engine.

A witness testifies that on the day before this fire a fire was started near this house by this identical engine, and there is abundant evidence in the record that within a short time before this fire a number of fires were started in the neighborhood of this house by passing trains.

The case of C., N. O. & T. P. R. Co. v. Sadieville Milling Co., 137 Ky., 568, is relied on by counsel for appellant as authority for the proposition that the evidence in this case was not sufficient to take it to the jury. But in that case the court said:

"In the case under consideration no one saw any of appellant's trains pass by on the night of the fire; no one testified as to sparks coming from them; \* \* \* there is not even testimony to the effect that other fires had been started by appellant's engines near this point, shortly before or after the fire."

The case of Louisville & Nashville R. R. Co. v. Hamburg-Bremen Fire Ins. Co., 152 Ky., 510, is also relied on for the same purpose, but in that case the court said: "There was not only no evidence that any one of the locomotives of the trains emitted sparks, but there was no evidence going to show that the particular engine on any one of these trains had, a short time before or after the fire, emitted sparks. While it may be true that the fire in the stove was out, the weight of the evidence is to the effect that at the time the fire on the roof was discovered there was a fire in the sitting room, though the witnesses differ as to its size. The only evidence relied upon for the submission of the case to the jury is that the house was located 125 or 140 feet from the railroad. \* \* \* The house was occupied and there was a fire in the house, though there is a dispute as to the size of it. Plaintiff had put shucks and cobs on the fire. It is just as probable that the roof caught from a spark from the fire as a spark from a passing train, in the absence of any evidence tending to show that any passing train was emitting sparks, or that sparks were picked up in the vicinity of the fire."

It is, we think, plain that the facts of these cases are so different from the facts of the present case that they should not be regarded as controlling authority.

On the other hand, in C., N. O. & T. P. R. Co. v. Falconer, 30 Ky. L. R., 152, and Chesapeake & Ohio R. Co. v. Preston, 143 Ky., 189, among many others of like character, this court has held that circumstantial evidence similar to that appearing in this record was sufficient to submit the case to the jury and sustain a verdict.

It is further urged that as the evidence for the railroad company showed that the spark screen or arrester on this particular engine was in perfect order on the day

of the fire, and that the engine was being operated with ordinary care, these facts were sufficient to support the conclusive presumption that the fire could not have originated by sparks thrown from this engine.

In response to this argument we may repeat what was said in *Southern Ry. v. Kentucky v. Hanna*, 21 Ky. L. R., 850, where it was said: "There was testimony tending to show that the engine had the latest improved spark arrester, and that it was in proper condition, but there was testimony which tended to show that if it had been in proper condition it could not have emitted sparks which would have set fire to the grass. While this testimony tends to rebut the circumstantial evidence of the plaintiff, yet the jury considered the testimony in connection with the other testimony and concluded that the loss was occasioned by sparks from the engine. Having reached this conclusion the testimony was abundant to show that if the spark arrester had been in proper condition the fire would not have been caused by sparks emitted from the engine. The jury was the judge of the facts and we are not disposed to disturb its verdict." To the same effect is *L. & N. R. R. v. Home Insurance Co.*, 146 Ky., 281.

Upon the whole case we find no reason for interfering with the judgment, and it is affirmed.

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## **Bankers Surety Company, et al. v. City of Newport.**

(Decided February 2, 1915.)

### **Appeal from Campbell Circuit Court.**

1. **Bonds—Officers—Fiduciaries.**—The bond of a public fiducial officer is controlled by Sections 3751 and 3752, Kentucky Statutes, and must be read in connection therewith.
2. **Bonds—Officers.**—Under Section 186d, Kentucky Statutes, the statutory obligation which is really the basis of the contract obligation for public officials, is that the officer will faithfully discharge the duties of the office or else the surety will pay the loss occasioned thereby, not to exceed the sum fixed in the bond.
3. **Municipal Corporations—Act Through Officers.**—A city can only act through its officers, and those officers cannot bind the city, unless authorized or directed by law.
4. **Municipal Corporations—Officers.**—For the reason that municipal corporations and their officials are not *sui juris*, they have no authority to take an obligation from a surety of any official for

any failure less than a faithful discharge of the duties of the office, nor the right to impose by contract any duties on other officials, so that a breach of such added duties would avoid the bond.

5. Bonds—Municipal Corporations—Officers of.—A bond of a city official is executed in the light of the statutes above referred to, any limitations in the bond in derogation of the statutory requirements are not binding against the city.

HARRY L. GORDON, ROBERT C. SIMMONS and GORDON, MORRELL & GUNTER for appellants.

OTTO WOLFF and L. J. DISKIN for appellee.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Henry Reusch was delinquent tax collector of the city of Newport during the years 1909, 1910, and 1911, and defaulted in the sum of about \$15,000. The appellant was surety upon his bond as such collector for the year 1909. That part of his defalcation occurring during the years 1910 and 1911 is not involved in this controversy. The city sued to recover of appellant as surety the sum of \$1,600 with interest, the alleged amount of his shortage for the year 1909. The case was referred to a commissioner, who reported that the proof showed a shortage of \$1,249.79. Judgment of the lower court went against appellant for that amount. No question is raised as to the amount of the shortage. Before considering the grounds relied upon by appellant for reversal, it may be well to explain further that under the provisions of Section 3188, Kentucky Statutes, Reusch was elected delinquent tax collector and executed the bond required by the Statute. It thus appears that he was a public officer—not an employe. He was elected to serve the city in an official capacity for a term of two years.

The appellant contends that the city failed to comply with Section 5 of the bond, and thereby absolved appellant from all liability. The city admits the failure to give the notice, but insists upon its right of recovery notwithstanding. That clause of the bond which it claims the city breached is as follows:

“5. That the employer’s claim for default hereunder must be presented to the surety within six months from the date the responsibility of the surety for the employe’s further acts ceased from any cause, and no suit or proceeding at law or in equity shall be brought



after 365 days shall have passed from the date upon which the surety's responsibility for the further acts of the employer ceased."

Appellant concedes that so much of the clause as requires a suit to be brought within 365 days is void, because it is against public policy and in contravention of the statutes of limitation, but it says the *employer*, that is, the city, failed to present to the surety a claim for the default within six months from the date its responsibility ceased on the bond. It cites and relies upon the case of Ballard County Bank's Assignee v. U. S. F. & G. Co., 150 Ky., 236, where this court had under consideration a similar clause in a surety bond executed to a private corporation. In that case it was held that the clause only required discovery of the losses and notice thereof by the employer within a six months' period, and that its effect was not to fix a period of limitation for filing suit different from that prescribed by the statute. The contract as to notice was deemed binding as against individuals or private corporations because parties who are *sui juris* have a right to contract as they please, subject to the limitation that the contract shall not violate the constitution or statute or be against public policy.

But a city, of course, can only act through its officers. Were the city officers who took this bond *sui juris*? Although the six months' notice clause might be considered as not attempting to fix a period of limitation less than that prescribed by statute for instituting an action, was the bond none the less in contravention of the statutes regulating official bonds, and therefore against public policy?

As is said in the case of U. S. F. & G. Co. v. Commonwealth, 31 Ky. L. R., 1179:

"A public officer has no authority except such as is conferred upon him by law. \* \* \* A State (and the appellee here is but an arm of the State) is never affected by the acts of her officers beyond the scope of their duties; for all persons dealing with them must take notice of the laws of the land."

Sections 3751 and 3752 of the Kentucky Statutes prescribe certain terms and provisions that must be in the bond of public officials. Section 3751 says:

"Such bond shall be a covenant to the Commonwealth of Kentucky from the person and his surety that *he shall*

*faithfully discharge the duties of the office, trust or employment."*

Under the authority of *Conley v. American B. & T. Co.*, 113 Ky., 1903, such bonds are controlled by these sections of the statute, "and must be read in connection therewith."

By an act of 1908, which is Section 186-d, Kentucky Statutes, it is provided that such bonds "shall be limited in a definite penal sum, which shall be determined and fixed by the officer or officers whose duty it is to approve the bond." It will thus be seen, that the statutory obligation, which is really a part of the contract obligation for public officials, is that the officer will faithfully discharge the duties of the office or else the surety will pay the loss occasioned thereby, not to exceed the sum fixed in the bond. We find no authority for any other contract limitation.

The city made no warranty to the appellant that its officials were honest and diligent, and there is no authority for an official or set of officials to undertake, on behalf of the city, any such warranty as to other officials. There is no statute making it the duty of any officer to give notice of a defalcation to the surety on a bond, and no officer has the power to bind the city by any contract that such notice will be given. As above stated, the city can only act by its officers, and those officers can act for the city, that is, bind the city, only when authorized or directed by law. *Wade v. Mt. Sterling*, 18 Ky. L. R., 377; *Fidelity & Deposit Co. v. Commonwealth*, 104 Ky., 583; *Delker v. Owensboro*, 27 Ky. L. R., 1777; *Schwerman v. Commonwealth*, 18 Ky. L. R., 585.

The case of *Fidelity & Deposit Company v. Commonwealth*, 104 Ky., 583, distinguishes between the power of public officials and the power of officers or employees of a private corporation or an individual to bind their principal with reference to indemnifying bonds. The *Ballard County Bank* case, *supra*, and some of the others cited, recognize the right of individuals and private corporations to assume such obligations as we have been discussing, and for the reason that they are *sui juris*. But for the reason that municipal corporations and their officials are not *sui juris* they have no authority to take an obligation from a surety on a statutory official bond conditioned for less than a faithful discharge of the duties of the office, nor have they a right to add by con-

tract any duties on other officials, or qualify those duties imposed by law so that a breach of such added duties would void the bond.

The case of *Commonwealth v. Tate*, 89 Ky., 587, was to recover of sureties upon the bond of Tate warranting that he as treasurer, "shall faithfully and diligently discharge all of the duties pertaining to said office." There were no conditions or provisos in or attached to the bond. The sureties defended on the idea that it was the duty of the Auditor and Secretary of State, under the law, to make periodical settlement of his accounts, and that the shortage came by reason of the negligence of those officers in that regard. Arguing that such omissions of those officers were breaches of the contract on the part of the State, it was contended that the State was estopped to assert a claim on the bond. It was held that the creation of the office of Auditor and Secretary of State, and imposition upon them the duty to examine and inspect the treasurer's office was a safeguard for the benefit of the State—not directly for the benefit of his sureties. It was for the protection of the State and the security of its funds that such examinations and settlements with other officers were required. For its further protection a bond with surety was required of the treasurer if, notwithstanding the other safeguards placed around him, perchance he should default.

In holding that omission in duty by other officers did not estop the State from proceeding against the sureties of the treasurer the court said:

"The Commonwealth in investing the Auditor and Secretary of State with the powers above mentioned, did not do so as a guaranty to the sureties of Tate that he would faithfully discharge his duties. If such had been the purpose, there would have been no need of Tate's giving security for the faithful discharge of his duties; but the power was given to them as an additional guaranty to the people. Hence, the law required Tate to give bond, with sufficient sureties, that he would faithfully and diligently discharge his duties; and, not being satisfied with this security alone, additional safeguards were thrown around his official conduct in the way of preventing his stealing, and speedily detecting the same, as additional security to the people; and, as still an additional security to the people, bond, with sufficient sureties, was required of the Auditor that he would faithfully and diligently discharge the duties."

We are of the opinion that the bond was executed in the light of the statutes referred to and should be read in connection therewith, and any limitation in the bond in derogation of the statutory requirements is not binding as to the city. And the city having sustained the loss as ascertained by the commissioner and adjudged by the lower court, and this loss resulting from the failure of the principal, a public official, to faithfully discharge the duties of the office, the surety is liable.

The judgment is, therefore, affirmed.

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### **Louisville Tobacco Warehouse Company v. Louisville Water Company.**

(Decided February 2, 1915.)

#### **Appeal from Jefferson Circuit Court (Common Pleas, Second Division).**

1. **Public Service Corporations—Water Companies—Notice.**—In the case of a public service water company it is a reasonable rule to refuse service if, after notice, a water bill remains unpaid. In such event, however, it is liable in damages if the bill rendered is unjust or erroneous.
2. **Public Service Corporations—Deprivation of Service—Damages.**—The consumer deprived of service for non-payment is not entitled to recover damages, if the bill rendered was just and correct although he may have refused payment because he in good faith believed it was unjust and exorbitant.
3. **Public Service Corporations—Water Companies—Evidence.**—It was not prejudicial error for the court to reject as evidence certain receipted water bills, when their effect was only cumulative, and they could have demonstrated nothing more than certain facts already established and virtually admitted as true.

HUMPHREY, MIDDLETON & HUMPHREY for appellant.

A. J. CARROLL for appellee.

#### **OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

This case started in the Quarterly Court of Jefferson county. The water company filed a petition in that court seeking to recover from the warehouse company the sum of \$177.47, claiming that it had furnished the warehouse company the quantity of water which, according to its rates, was of the value mentioned.

The warehouse company filed an answer and counterclaim, denying that the quantity of water mentioned in the petition had been furnished, and setting up affirmatively that the bills for the period in controversy were unusually large and exorbitant; that it had offered to pay the amount of an average bill; that the water company had refused to accept this amount and had wrongfully and illegally shut off the water from the warehouse company's hydraulic elevator; that by reason of this it was unable to operate its elevator, and that its business was damaged to the extent of \$1,000.

On motion the case was transferred to the Jefferson Circuit Court, and in due time a reply was filed traversing all the allegations of the answer and counterclaim. With the issues thus joined, the case was tried and submitted to a jury and their finding was in favor of the water company for the amount claimed in the petition. On this appeal, the warehouse company asks a reversal upon the following grounds:

"1. That the court erred in refusing to allow the warehouse company to introduce in evidence its monthly water bills for six or seven months directly preceding the period in dispute.

"2. That the court erred in refusing to instruct the jury that if a bona fide dispute, based upon reasonable grounds, existed between the water company and the warehouse company as to the correctness of the bills rendered, the water company had no right to shut off the water from the warehouse company during this dispute."

The following are the facts out of which the controversy arose: The warehouse company used a hydraulic elevator in its tobacco house. The water by which the elevator was operated was furnished by the water company through a special meter, that is, a different meter from the one used to register consumption of water elsewhere about the plant. The tobacco house was several stories high, and the business was handling and storing tobacco on the various floors, so that it was very necessary to keep an elevator in service to move the hogsheads up and down as the occasion might require. The meter in use up to the time this trouble began was installed about 25 years prior thereto. The evidence for the water company shows that the meter was old and worn out and was not registering correctly. This fact

was revealed by the water company's inspector, and, thereupon, in July, 1912, it was taken out and a new one put in its place. The evidence of the water company as to the inefficiency of the old meter is not controverted. For the six months preceding this change the elevator water bills had ranged in amount from \$3 to \$14 per month, or an average of about \$8. These facts are shown by avowals made by the warehouse company in an attempt to introduce as evidence receipted water bills for these months.

The bill for the first month after the new meter was installed, July 19th to August 19th, was \$128.28, and it showed a water consumption of 1,063,656 gallons. For the next month the bill rendered was for \$49.19 on a consumption of 342,548 gallons. These bills were so extraordinarily large that the warehouse company refused to pay them. They are the ones embraced in the petition filed in the quarterly court. The bill for the third month was down to "normal," to use a term of the warehouse company; that is, for 39 days there was a charge of \$11.52 on a consumption of 102,476 gallons. The warehouse company refused to pay the two large bills because it claimed they were excessive and erroneous. The last bill, \$11.50, was settled some time before the suit was filed. Upon refusal to pay the two bills in question, and after notice, water service was cut off from the elevator by the water company. This was pursuant to one of its rules.

When the water company's inspector read the new meter at the end of its first month's service, it was noted that the registered consumption was unusually large. Four days later another inspector was sent to re-read the meter and verify the first report. He ascertained, as he testified, that the first reading was correct, and that, in addition, 17,600 gallons had been consumed in the four days between the two readings. The water company then, pursuant to a custom, sent written notice to the warehouse company that the amount of water shown to have been delivered through the meter was so large as to indicate a leak at some place in the warehouse service pipes or in the elevator. On August 19th, the bill for \$128.28 was rendered. This, together with the warning of the leak, caused the warehouse company, on August 28th, "to have its plumbing and hydraulic elevator examined so that any needed repairs

could be made." The testimony of the plumber shows that the pipes leading from the meter to the elevator were in good condition and free of leaks. As to the elevator, they say there was some seepage, but it was of no consequence. We understand from the record that the seepage referred to by the plumbers is such as is found with all hydraulic elevators, and it does not serve to account for any material part of the water registered. But it is also shown from the testimony of the plumbers that they repaired two water valves in the elevator chamber; that is, the leather cups in the inlet and outlet valves had been in service long enough (8 or 10 months) to need new ones in their place, and new ones were put in. They say that there was no leak around these old leather cups, and that they put in the new ones merely because it was getting time to renew them, and it was then convenient to do so. But their testimony as to the improbability of a leak at these valves is weakened when they show the improbability of a leak being discovered by them. In making the repairs to the valves the water was necessarily cut off from the elevator. There being no water or pressure, no leaks would be apparent. In this, the second month, the elevator was operated for ten days with the old valves and 21 days with the new ones, and we find the water consumption recedes from \$128.28 to \$49.19. During the next month the expense of service with the new valves was back to \$11, or "normal."

The warehouse company maintains that there was no leak in their service pipes or valves. It is contended that the trouble was in the new meter; that it was improperly adjusted when it was installed, and for this reason the excessive amounts were registered during the first two months. "Normal" registration in the third month is accounted for by argument that the new meter in course of time just settled down to good work, or was properly adjusted by the water company inspectors when they were making some of their frequent readings. The water company contends that the new meter at all times registered correctly. To sustain this position, it relies upon the three or four inspections it caused to be made of the meter during the two or three months in question, and also the fact that as soon as the warehouse company renewed the valves in the elevator the registered water consumption was satisfac-

tory to both parties. The water company argues that the repair of the elevator valves and the normal registration afterwards shows beyond controversy that there was a leak in the elevator. From the evidence it appears that the elevator was operated by water under 70 pounds city pressure—that when the inlet valve was opened into the elevator chamber the elevator platform was raised by the water pressure. When the outlet valve was opened the water was released into the sewer and the elevator platform was thus lowered. The proof shows that a leak the size of the lead in a pencil in one of these valves will, during a month, under 70 pounds pressure, show a consumption equivalent to that charged for in the first bill. But the warehouse company argues that unless there was a leak of the same size in the outlet valve the elevator platform would not remain stationary. It proves that the elevator platform never gave any trouble on this score, and that an identical leak in both valves is a coincidence too unlikely for consideration. The facts in evidence amply justify the argument of both parties, and it is not insisted that the court erred in submitting the case to the jury. The lower court took the view that the main question was whether the water company had delivered to the warehouse company the quantity of water shown by the meter.

The following instructions were given:

"1. If you believe from the evidence that the plaintiff, the Louisville Water Company, furnished to the defendant, the Louisville Tobacco Warehouse Company, from July 19th to August 19th, 1912, 1,063,656 gallons of water, and from August 19th to September 19th, 1912, 342,584 gallons of water, then the law is for the plaintiff and you should so find. But, unless you so believe from the evidence, then the law is for the defendant, and you should so find.

"2. If you find for the plaintiff as against the defendant, you should award it the sum of \$128.28 and the further sum of \$49.19.

"If you find for the defendant you will award the defendant as against the plaintiff such sum in damages as you may believe from the evidence will fairly and reasonably compensate it for any loss of business growing directly out of the shutting off of the water by the plaintiff, the whole award not to exceed the sum of \$1,000, the amount claimed in the counter-claim."



Aside from the errors complained of, and which we shall presently discuss, we may remark that instruction No. 1 was more than fair to the warehouse company. In effect, the jury were told that the water company could not recover anything unless the jury believed it had delivered the exact number of gallons mentioned in the instruction.

But the warehouse company insists that the lower court misconceived the issue. Its contention is that, although the water company may have delivered the quantity of water registered by the meter, yet, if the quantity was so large and unusual as to raise suspicion, it constituted reasonable ground for resisting payment; and if, in fact, there was a bona fide dispute as to the correctness of the bill, then the water company, although the bill was correct, had no right to shut off water from the warehouse company during the dispute. The court refused to give the two instructions quoted below, which appellant offered as embodying its view of the law:

"2. Even if you believe from the evidence that there was such a leak in the elevator as required the use of 1,063,656 gallons of water from July 19th to August 19th, and 342,584 gallons from August 19th to September 19th, yet, if you believe from the evidence that the defendant was disputing with the plaintiff as to the correctness of the quantities of water and the bills rendered, and, furthermore, that such dispute was based upon reasonable grounds, the court instructs you that the plaintiff had no right to cut off the supply of water from the defendant's elevator; and if you believe that the plaintiff did so cut off this supply of water, the law is for the defendant on its counter-claim, and you shall so find.

"4. If you believe from the evidence that at the time the plaintiff cut off the water from the defendant's elevator the defendant was engaged in a bona fide dispute with the plaintiff as to the correctness of the water bills, and if you believe further that such dispute on the part of the defendant was based upon reasonable grounds, then the court instructs you that the plaintiff had no right to cut off the water from defendant's elevator, and the law is for the defendant on its counter-claim and you shall so find."

Public service corporations having the right of eminent domain, or exercising the use and occupation of

streets or highways, whether along or under them, in a manner not permitted to the public generally, are privileged to make and enforce reasonable rules for the conduct of their business. But within such rules they owe to every member of the public the same character of service—that is, service on equal terms and without discrimination. For instance, a common carrier may refuse to accept passengers or to carry freight if the fare or rate is not paid or offered to be paid at the time which has been fixed by established and reasonable rules. But if the passenger or package does not conform to such rules then service may be refused. Always, however, when the corporation passes judgment on its own case, it does so at its peril. In other words, it must be right, otherwise it is liable in damages to the injured party. In fact, as to all parties, when one elects to stand upon his rights it behooves him to be right.

It must be conceded, therefore, that a public water company may cut off its service for failure on the part of the consumer to pay the charges, that being a reasonable rule and regulation. *Cox v. City of Cynthiana*, 123 Ky., 363; 40 Cyc., 804. But we quite agree with counsel for the warehouse company that there is a limitation on this principle. For instance, a water company may not deliberately or erroneously make out an excessive bill, and, for failure of the consumer to pay it, cut off the service, without becoming liable for such damages as the consumer may sustain by reason of its arbitrary and wrongful action. The water company, like any other vendor of an article for public or private consumption, has recourse to the courts for the settlement of disputed bills, but, in view of the fact that it does not choose its patrons, and it owes a service to the public, and all of the public are entitled to that service by paying for it, it is the generally accepted rule that in addition to having recourse to the courts, the water company may enforce payment of its lawful charges by shutting off the water from particular premises, and it may refuse to furnish water until its bills are paid. But, when it adopts the latter and more drastic remedy, it must be correct in the amount and manner of its demand. In a suit for damages resulting from shutting off the water, it is therefore competent to attack the correctness of the demand, and, if it is shown to be wrong, the water company should pay the damage which it has

inflicted by thus taking the law into its own hands and becoming judge of its own case.

On the other hand, the consumer has no right to demand continued service when he refuses to pay merely because he believes the bill is exorbitant, or because he in good faith disputes the correctness of it, even though there are reasonable grounds for the dispute. He has ample remedy to protect himself against extortion or damage or loss of service. As above stated, he may recover damages if it appear that he has been deprived of service for refusal to pay an unjust bill, or he may keep the service by paying under protest the bill rendered and sue to recover the excess, or he may execute bond and enjoin the water company from shutting off the service until the dispute is terminated.

In support of its position the appellant cites the following cases: *South Carolina Pool v. Paris Mountain Water Co.*, 86 S. C., 436, 62 S. E., 874; *Wood v. City of Auburn*, 87 Me., 287, 36 Atlantic, 906; *State v. Kinloch Tel. Co.*, 67 S. W. (Mo.), 648; *Borough of Washington v. Washington Water Co.*, 62 Atlantic, 390 (N. J.); *Benson v. Paris Mt. Water Co.*, 88 S. C., 351, 70 S. E., 897.

All of these cases were equitable proceedings for injunction or mandamus. They recognize the right of a consumer or municipality to resist the payment of an unreasonable price, or an excessive bill, and say that an injunction will issue to prevent the water company from terminating the service, or mandamus to compel the service. But, in such cases, where service is so coerced, the company is protected, for the complainant is under bond to secure the company in the payment of such rate and amount as may be determined proper in the course of legal proceedings.

We have reached the same conclusion entertained by the lower court, and that is, that there was but one question in this case, and that was whether the bill rendered was correct. The warehouse company elected to waive its right to mandamus. It sued by counter-claim for damages. As before stated, we are of the opinion that the warehouse company did not show a right to recover damages from the mere fact that the dispute, so far as it was concerned, was bona fide. In a civil proceeding the party in error is not saved the cost and consequence of his error by a show of good faith. It had no right to recover unless the water company was in the

wrong, that is, had presented and demanded payment of an unjust bill, and attempted to coerce payment of it by refusing water service. The court submitted the case to the jury with instructions to find whether the water company was in the wrong; that is, whether it did not supply all of the gallons of water it charged for; if it did not they were told to return their verdict for the warehouse company. And, in such event, they would also find for the warehouse company such damages as it sustained by being thus wrongfully deprived of water service.

The next question comes from the refusal of the court to permit the warehouse company to introduce in evidence water bills for the six or seven months just preceding the period in dispute. These bills were made out from readings of the old meter. It is uncontroverted that the old meter was defective, if not dead, and that its registrations were incorrect. Nor is there any dispute about the fact that the bills made out after installation of the new meter were unusually large. That is, the charges for water consumed as shown by the new meter were excessive in comparison to the charges during the preceding year, or as gauged by what the elevator ought to consume.

Mr. Kremer, the chief assessor for the water company, and the first witness introduced by it, says, with reference to this first bill: "There was a large excess over the preceding month." Neither is there any dispute about the good faith of the warehouse company in contesting them. The bills for water service registered by the old meter could have demonstrated nothing more than the above conceded and uncontroverted facts. We do not believe it was error to reject them under the circumstances of this case.

For these reasons the judgment of the lower court is affirmed.

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### **Saulsberry v. Saulsberry.**

(Decided February 2, 1915.)

#### **Appeal from Carter Circuit Court.**

**Rent—What Profits Included—Royalties From Mines.—Where a grantor conveyed land to his sons, and provided that his wife**

should "receive one-half of all rents from off the place, from all resources whatsoever," this provision held to include royalties from mines.

S. S. WILLIS and R. D. DAVIS for appellant.

H. R. DYSARD for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

William Saulsberry was the owner of about one thousand acres of land surrounding the town of Aden, in Carter county. On December 29, 1896, he conveyed the land to his two sons, Raymond H. Saulsberry and Harry Saulsberry, by a deed which contained the following provision:

"That if Elizabeth Saulsberry, the wife of William Saulsberry, should outlive said William Saulsberry that she has the right to control her house and household goods, and her garden and yard, and Elizabeth Saulsberry is to receive one-half of all rents from off the place, from all resources whatsoever, so long as she remains the widow of William Saulsberry, and has the right to assist the boys in renting and collecting rents on said land."

William Saulsberry died April 29, 1899. On the land in question were certain coal and clay mines, and ten or twelve small houses. In 1905 John M. Saulsberry leased the mines and operated them on a royalty basis until the year 1909, when he purchased the interests of his brothers, Raymond and Harry, in the land in question. Since that time he has been operating the mines.

This action was brought by Elizabeth Saulsberry, widow of William Saulsberry, and mother of John M. Saulsberry, against the defendant, John M. Saulsberry, to recover one-half of the rents, royalties and proceeds of timber sold since John M. Saulsberry acquired title. The case was transferred to equity and tried by the chancellor. The chancellor held that the deed did not cover royalties or timber, and gave judgment in favor of plaintiff for only one-half of the rents from the houses on the land. From that judgment plaintiff appeals.

The principal question to be determined is, whether or not the words "rents from off the place, from all resources whatsoever," include royalties from mines.

The evidence leaves no doubt that the grantor, William Saulsberry, knew of the existence of the mines, and that these mines were worked prior to his death, though the evidence for defendant tends to show that after he purchased the mines he made new openings on the land.

The word "rent" is variously defined as:

"The profit or return, reserved, payable periodically, but not necessarily immediately, if it issues from period to period, during the whole continuance of the grantee's estate, whether from year to year, or from month to month, etc. This will constitute the reservation a rent." 2 Blackstone, 41.

"A certain profit issuing yearly out of lands and tenements corporeal." Black's Law Dictionary, p. 1022.

"The compensation, either in money, profits, chattels or labor, received by the owner of the soil from the occupant thereof." *Shartenberg & Robinson v. Ellbey*, 27 R. I., 414, 62 Atl., 979; 3 Kent. Com., 460.

"A rent is a right to a certain profit issuing annually, or periodically, out of lands and tenements, corporeal, the use of them, and for furniture, in retribution for the land that passes." 20 Am. & Eng. Ency. of Law, 1st Ed., p. 1035.

"The profit out of lands and tenements." 34 Cyc., 1333.

"A sum stipulated to be paid for the use and enjoyment of land." In *Re Roth & Appel*, 181 Fed., 667, 104 C. C. A., 649, 31 L. R. A. (n. s.), 270.

"The consideration paid for the use of land." *Brooks v. Cook*, 38 Southern, 641, 141 Ala., 499.

"Something given by way of compensation to the lessor for the right to make use of the land demised." *National Subway Co. v. City of St. Louis*, 169 Mo., 319, 69 S. W., 290.

Royalty is a certain percentage or proportion, specifically stated or on a graduated scale, according to the value of the ore, based on either the net proceeds, smelter returns, mill returns or returns evidenced by the certificate of the United States Assay Office, or otherwise as the parties may agree upon. 27 Cyc., 710; *Maloney v. Love*, 11 Colo. App., 388, 52 Pac. 1029.

Counsel for appellee insist that the real difference between rent and royalty is that rent is the price paid for the use of a thing, while royalty is a part of the thing

itself. This distinction, however, can hardly be maintained; for it was held at an early date that if "a man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste." Coke Littleton, 54b; Clegg v. Rowland, L. R., 2 Eq., 160, 35 L. J. Ch., 396, 14 L. T. Rep. (n. s.), 217; Saunders Case, 5 Coke, 22. There the rent paid carried with it something more than the mere use. It was also compensation for the profits of the open mine. And, in *Indiana Natural Gas & Oil Co. v. Stewart*, 45 Ind. App., 554, it is said that the word "royalty" as used in a gas lease generally refers to "a share of the product or profit reserved by the owner for permitting another to use the property." In *Kissick v. Bolton*, 134 Iowa, 650, it is said that the word "royalty" as employed in a coal mine lease means a share of the profit reserved by the owner for permitting the removal of the coal, and is in the nature of rent. Though it may be conceded that "royalty" is a more appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from a mine, yet it cannot be doubted that the terms "rent" and "royalty," as the result of usage and custom, are often used interchangeably. 27 Cyc., 710; *Raynolds v. Hanna*, 55 Fed., 783. Indeed, mining leases are made every day where the term "rent" is employed, even though it may, as a matter of fact, assume the form of "royalties." Of course, in the ordinary interpretation of legal terms it is customary to give them their technical meaning, in the absence of anything to indicate that the words were used in a different sense. However, it not infrequently happens that a technical legal term is employed in an entirely different sense, and where, upon a consideration of the whole instrument, this fact is made clearly to appear, such meaning will be adopted. Thus, the word "heirs," which is much more comprehensive than the word "children," because it includes all those who are capable of inheriting, is often held to mean children where the context or other parts of the instrument in which it is employed show that it was so intended by the parties. Though

not so frequently, perhaps, it sometimes happens that the word "children" is used in the sense of "heirs" and is given that meaning. *Childress v. Logan*, 65 S. W., 124; *Moran v. Dillehay*, 8 Bush, 434; *Hood v. Dawson*, 98 Ky., 285; *Lachland's Heirs v. Downing's Ex'r.*, 11 B. Mon., 32; *Williams v. Duncan*, 92 Ky., 125; *Harkness v. Lisle*, 132 Ky., 767.

Indeed, the courts will not give to legal terms their strictly technical meaning when such a construction will defeat the manifest intention of the parties to the instrument. With this rule in mind, let us examine the deed and the circumstances surrounding the parties. The grantor had owned the land for many years. He knew of the existence of the mines. Not only so, but the mines had been actually worked in his lifetime. Elizabeth Saulsberry was his wife. He evidently intended to make for her some suitable provision. Under these circumstances, he provided that she was to receive "one-half of all the rents from off the place, from all resources whatsoever." If the defendant had leased the mines for a periodical rent there can be no doubt that plaintiff would have been entitled to half of such rent; and the purpose of the grantor should not be defeated merely because the defendant leased the mine on a royalty instead of a rental basis. Some effect must be given to the words "from all resources whatsoever," considered in the light of the grantor's knowledge of the existence of the mines, and of the fact that the mines, to say the least, constituted a very valuable part of the farm. It is clear, we think, that "all resources whatsoever" necessarily include the mines, and that the grantor intended that his widow should share equally not only in the income from the mines, but in all other income and proceeds from the farm, regardless of the manner and form of payment, or the name by which it might be designated. We are strengthened in this conclusion by the fact that for a number of years Mrs. Saulsberry was regularly paid her part of the royalties, thus showing that the parties themselves, looking at the matter in the light of the principles of common sense, placed the same construction upon the language of the deed.

We see no reason to disturb the judgment as to the rent of the cottages. On the return of the case, the chancellor will fix the amount of the recovery on the other items, either basing his findings on the proof now in the



record, or giving to the parties, if they desire, an opportunity to take additional proof.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Judge Hannah not sitting.

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**Commonwealth, By et al. v. Kosmos Portland Cement Company.**

(Decided February 3, 1915.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).

Courts—Stare Decisis.—The judgment appealed from is reversed upon the authority of *Commonwealth v. Ewald Iron Co.*, 153 Ky., 116; *Commonwealth v. Standard Oil Co. of Kentucky*, 162 Ky., 149, and *Commonwealth v. Inter-Southern Life Insurance Co.*, 162 Ky., 228, where the precise question here presented, was decided adversely to the decision of the trial court.

M. J. HOLT and A. SCOTT BULLITT for appellant.

HUMPHREY, MIDDLETON & HUMPHREY for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Reversing.

This proceeding was begun under Section 4260 of the Kentucky Statutes by the State Revenue Agent, in the Jefferson County Court, on February 4, 1911, for the purpose of assessing for taxation for the year 1911 certain personal property of the appellee, which appellant alleged was omitted from taxation for that year. The case was tried in the county court on July 13, 1911, and submitted for judgment, which was entered on August 21, 1911, assessing two items of small value. The Commonwealth prosecuted an appeal to the Jefferson Circuit Court by filing a transcript of the county court judgment in the circuit court clerk's office on September 16, 1911. When the case was called for trial on September 28, 1912, in the circuit court, the defendant, who is the appellee here, moved the court to dismiss the action without prejudice at the cost of the revenue agent, under the provisions of the Act of 1912, which requires a diligent prosecution of acts of this character. (Acts

1912, page 396.) This motion was sustained; and the action having been dismissed without prejudice at the cost of the revenue agent, he prosecutes this appeal.

The Act of 1912 was construed in *Commonwealth v. Ewald Iron Co.*, 153 Ky., 116; and, under the interpretation there given to the act, and by excluding the non-judicial days, it is conceded by counsel for appellee, and is unquestionably true, that the judgment of the circuit court in dismissing the action was erroneous. The decision in the *Ewald Iron Company* case was followed in *Commonwealth v. Standard Oil Co.*, 162 Ky., 149, and again in *Commonwealth v. Inter-Southern Life Insurance Co.*, 162 Ky., 228. Those cases are on all fours with the case at bar, and, under the principle of *stare decisis*, require a reversal of the judgment of the circuit court.

Judgment reversed and cause remanded for further proceedings.

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### **Looms v. Standard Printing Company.**

(Decided February 3, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Second Division).

1. **Landlord and Tenant—Lease—Covenant of—When Not An Option.**—A clause in a twenty-year lease which provides: "Party of the first part (lessor) is to make an allowance of fifteen hundred dollars (\$1,500.00) out of the first year's rent; said sum to be expended in installing heating plant and in rearranging elevator (in leased premises)," was not a mere option granted the lessee, but a covenant whereby the lessor obligated himself to pay or allow the lessee that sum on the cost of installing the heating plant and rearranging the elevator.
2. **Landlord and Tenant—Obligation Imposed Upon Lessee—What was a Sufficient Performance of.**—As the above clause of the lease failed to fix the time for installing the heating plant and rearranging the elevator, it should be presumed that the parties contemplated that the work would be performed in a reasonable time and before the expiration of the first year of the lease. But where the lessee within a reasonable time and during the first year of the lease, substantially completed the work on the elevator and began work on the heating plant in time to have completed it in that year, but was forced into bankruptcy by his creditors before it could be completed; and the leasehold and all rights under the lease, together with other property of the lessee, was sold under the bankruptcy proceedings, and the purchaser

at such sale, with the knowledge of the lessor and without objection from him, completed the installation of the heating plant and the little work remaining to be done on the elevator; and in the meantime paid the lessor all rent on the leased premises as it accrued, with the understanding between them that such purchaser would upon the completion of the heating plant, claim and be allowed out of the rent going to the lessor as paid by the latter, the \$1,500.00 on the cost of the elevator and heating plant; the lessor, under these circumstances, was properly held liable for the \$1,500.00, although the installation of the heating plant was not completed until the second year of the lease.

BURNETT & BURNETT for appellant.

BURNETT, BATSON & CARY for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, George Looms, is the owner of a four-story building on First street, between Market and Jefferson, in the city of Louisville, which he, in May, 1910, leased for a term of twenty years from September 1, 1910, to the Globe Printing Company, at a rental of \$2,000.00 per annum, payable in equal installments at the end of each month. This contract was reduced to writing and duly signed by the parties thereto. It contains the following clause:

“Party of the first part (appellant Looms) is to make an allowance of fifteen hundred dollars (\$1,500.00) out of the first year's rent; said sum to be expended in installing heating plant and in rearranging elevator.”

A portion of the premises was to be occupied by the lessor himself until December 1, 1910. The lessee, Globe Printing Company, an extensive printing concern, owning a large quantity of heavy machinery, began to move into the property early in September, 1910, but did not get all of its machinery therein until some time in the month of December. It was clearly understood between the parties to the contract that the elevator then in the building was inadequate for the use the Globe Printing Company would have to make of it, and that it would have to be enlarged and otherwise changed; also that a heating plant would be indispensably necessary to the Globe Printing Company's use of the leased premises. When the Globe Printing Company commenced to move into the property it at the same time began to take bids on the heating plant, but none of the bids immediately made were accepted, be-

cause they were thought to be excessive; and, in view of the fact that it would have been impossible to install the heating plant in time for the winter season, a large stove was used for heating the building during the winter following the removal of the Globe Printing Company therein. The situation as to the elevator, however, was different, and the Globe printing Company at once began its rearrangement, and by March 20, 1911, had so far progressed with the work on the elevator as to have expended \$1,040.00 thereon and practically completed it.

On the date last mentioned the Globe Printing Company was adjudged a bankrupt and a receiver in bankruptcy appointed to take charge of all its property, including the leased premises. He at once had done the little work required to complete the elevator. Soon thereafter the receiver was elected trustee of the bankrupt and operated the plant as such until it, together with the leasehold in question and all rights thereunder, was sold to the appellee, Standard Printing Company. Prior to this sale the trustee in bankruptcy took up with the appellant, Looms, the matter of rent in arrears, and insisted upon withholding the rent then due the latter upon the leased premises until the \$1,500.00 stipulated in the lease should be deducted, but shortly thereafter the referee in bankruptcy adjudged that the trustee pay the rent then in arrears and reserve all rights to the allowance of the \$1,500.00 out of future rents. This adjustment of the matter made the lease more valuable to the trustee in selling the property. The lease, being an asset of the bankrupt's estate, was, by direction of the bankrupt court, sold to the appellee with the plant and other effects of the bankrupt on April 21, 1911. When the order of sale was made it was objected to by appellant for the reason thus stated in the pleading filed by him in the bankruptcy proceeding:

"George Looms objects to any allowance being made to the trustee herein, or the Globe Printing Company, in any amount, for costs of installing an elevator in the premises now occupied by said trustee, because, by the terms of the said lease, no allowance was to be made *until the heating plant had been installed and the elevator rearranged*; that the said lessee's contract to install said heating plant and rearrange the elevator *was an entirety contract* and said lessee was entitled to no compensation for same whatsoever until the *full contract* had been carried out and completed."

As by the sale the property and leasehold went into the hands of the appellee, Standard Printing Company, with the right to complete the heating plant and deduct the \$1,500.00, the latter right constituted a valuable part of the consideration in the sale of the property. At the time of the sale the rearrangement of the elevator had been completed. Although appellee had moved into the property following its purchase in April, 1911, the trustee in bankruptcy paid to appellant the July and August rent, owing to the fact that, notwithstanding the sale, he continued as receiver to close up unfinished printing bids which had not been embraced in the sale. Immediately after appellee's purchase of the plant and leasehold it accepted a bid for the installation of the heating plant, and it was completed in the early fall and the heating plant put in operation in time for use during the winter of 1911. The installation of the heating plant appears to have cost \$1,833.60, and the elevator \$1,527.00, making the total cost of the heating plant and elevator \$3,360.60. The heating plant and elevator constitute permanent improvements which increase the vendible value of the property at least as much as they cost.

After the completion of the heating plant appellee advised appellant of its purpose to withhold the rent due him on the building, as it accrued from month to month, until it received the \$1,500.00 which the lease stipulated should be allowed out of the rent for installing the heating plant and rearranging the elevator. Thereupon appellant refused to allow the \$1,500.00 to be so deducted from the rent, claiming a forfeiture of the lease, and threatened appellee with a forcible detainer proceeding for the possession of the leased premises, if not peaceably surrendered. To prevent the threatened forcible detainer proceedings appellee instituted an action in equity in the Jefferson Circuit Court, chancery branch, first division, asking an injunction; that it be given leave to pay into court all rents as due until the court could determine the rights of the parties; and finally asked that it be given a judgment against appellant for the \$1,500.00. The case was transferred by the chancery court to the common pleas branch, second division, and on the trial in the latter court a jury was waived and the law and facts, by agreement of the parties, submitted to the court, which adjudged that ap-

pellee recover of appellant the \$1,500.00 claimed in the petition, with interest thereon at the rate of six per cent. per annum from April 14, 1913, until paid, and its costs in the action expended. The court's written conclusions of law and fact appear in the record. The appellant, being dissatisfied with that judgment, by this appeal, seeks its reversal.

It is the contention of appellant, and such was the defense interposed by his answer that the clause of the lease under which appellee claims the allowance of \$1,500.00 out of the rent of the leased premises to reimburse it, in part, for the cost of installing the heating plant and rearranging the elevator, does not constitute a contract or undertaking that obligates him to contribute that amount toward defraying the cost of these improvements, but that it is a mere option by which appellee's assignor, the Globe Printing Company, could have obtained a reduction of \$1,500.00 out of the first year's rent, provided such option had been accepted by it and the work of installing the heating plant and rearranging the elevator performed within such year.

We do not think the language of the clause in question authorizes such a construction. It does not stipulate the time within which the heating plant should be installed or the elevator rearranged; therefore, its meaning is that this work had to be done within a reasonable time; and we concur in the conclusion of the circuit court that it was done within a reasonable time. Even if there were greater plausibility in appellant's contention, the evidence shows that before the year was out the work of rearranging the elevator had been wholly completed and that appellee's assignor had commenced to make preparation for the construction of the heating plant and some work had been done towards its completion. The contract for the installation of the heating plant was let by appellee after its purchase and before the first year of the lease had expired. The work was begun in the first part of September, 1911, and the plant completed and in operation in ample time for the second winter's heating. Such delay as occurred arose out of no fault of appellee or its assignor. The latter was forced into bankruptcy before the work of installing the heating plant could possibly be completed. The proceedings in bankruptcy temporarily suspended the work upon the heating plant. As soon as the sale of the

bankrupt's property and effects, including the leasehold, took place, the work of installing the heating plant was immediately taken up by appellee and prosecuted without delay until completed. Pending the bankruptcy proceedings both appellee and appellant were protected in their rights by the referee in bankruptcy, the trustee being required to pay the latter's rents as they became due, but with the reservation that appellee should not be prejudiced thereby, but would be allowed to later assert its claim to the \$1,500.00 which the contract entitled it to demand out of the rent on the cost of the improvements it required to be made.

It is also apparent from the evidence that appellant himself made no claim that the clause of the lease referred to was a mere option, or that the improvements had to be completed within the first year of the lease, until after both the elevator and heating plant had been completed. On the contrary, the only complaint that came from him before the completion of the improvements was that the allowance of \$1,500.00 out of the rent was not to be made until the heating plant had been installed and the elevator rearranged. It also appears from the evidence that appellant was in and upon the leased premises at various times while the work of installing the heating plant was going on and that he then did nothing to prevent the work or forewarn appellee of his contention thereafter to be made. We, therefore, conclude, as did the circuit court, that the construction attempted to be placed upon the clause of the lease in controversy by appellant's answer, is an afterthought; and that, if such had been his previous construction of it, good faith would have required him to have so informed appellee after it acquired the lease and before the work was done. Moreover, appellant has received and will yet enjoy whatever benefit may accrue to his property from the installation of the heating plant and the rearrangement of the elevator. For these improvements he agreed to allow \$1,500.00 out of the rents, and it imposed no hardship upon him to compel him to make the allowance out of rent that accrued after the first year of the lease, instead of paying it out of the first year's rent. Appellee, by its purchase of the lease, acquired all the rights of the original lessee, the Globe Printing Company, one of which was the right to install the heating plant and complete the elevator and to

receive therefor the \$1,500.00 agreed to be paid by the lessor, and this right the circuit judge properly enforced.

Being of the opinion that the circuit judge properly determined the rights of the parties, the judgment is affirmed.

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### **Taylor v. Commonwealth.**

(Decided February 3, 1915.)

#### **Appeal from Fayette Circuit Court.**

1. **Criminal Law—Confession—Competency.**—Evidence by a railroad detective that, according to reports received by him through railroad channels, a certain freight car consigned to a point in Alabama when it reached its destination showed that it had been broken into and a part of its contents missing, was not competent in connection with the confession of the defendant, to show that the offense had been committed.
2. **Criminal Law—Confession.**—Under the express provisions of Section 240 of the Criminal Code, a confession of a defendant made outside of court must be, to authorize a conviction, accompanied by other evidence that the offense was committed.

JESSE I. MILLER and HARRY B. MILLER for appellant.

JAMES GARNETT, Attorney General, for appellee.

#### **OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

Appellant and Sam Chandler were jointly indicted in the Fayette Circuit Court charged with appropriating property in the possession of a common carrier for transportation.

Appellant, on his separate trial, was found guilty and sentenced to the penitentiary, and from that judgment has appealed.

Appellant was arrested on the 30th day of July, 1914, having in his possession at the time seven pairs of new shoes, which he was undertaking to dispose of to a second-hand dealer. He was lodged in jail, and after remaining there an hour or two, he sent for the officers and told them that if they would take him to a certain trestle of a railroad in the edge of Lexington he would show them where his confederates were; at



the same time he told them that he and three or four others, including Chandler and a man called Boots, had gotten the shoes from a railroad car, together with some hams, and that they had thrown them out of the car and gone back after them when they had alighted therefrom. Accordingly, the officers found one of the confederates, who was arrested, and guided by the two, the officers went to two places in Lexington, where they found nine of the hams, seven at one place, and two at another.

This confession of the appellant made at the jail and subsequently, appears to have been wholly voluntary.

Upon his trial the defendant pleaded not guilty, and the substance of the evidence was as given above, except that it was testified by a witness that he represented the railroad and superintended the loading of a certain freight car at Cincinnati, and that, according to the bills, there were loaded in said car fifty-seven cases of shoes and eight cases of hams of a particular brand, but that he personally did not know the cases actually contained either the shoes or the hams.

It was also shown by the railroad detective that when the car reached its destination in Alabama, according to reports made to the railroad company, it had been broken into and a part of the contents were missing.

It is apparent that the testimony of neither of the railroad men, or their combined testimony, is competent to show either that the shoes or hams were ever actually in the car, or that the car was ever actually broken into or the contents thereof disturbed. It is hearsay, pure and simple, to say that one got a report that a certain car reached its destination short of the goods which it is not even shown were ever shipped therein; and even if it were competent, there is nothing to show that it was broken into or the contents taken therefrom at any particular point in its long route.

Section 240 of the Criminal Code provides:

"A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

We feel constrained to hold that there was no competent evidence, other than the confession of the appellant, that the crime with which he was charged had ever been actually committed, and, therefore, under the express terms of the section quoted, the court should have

granted appellant's motion for a peremptory instruction.

It is a matter of common knowledge that men often confess to the commission of crimes which were, in fact, never committed, and doubtless the section quoted was enacted in the light of this experience.

However unfortunate it may seem to apply this rule in the instant case, it may be safely said that similar enactments have stood the test of civilization for generations. At any rate, it is the law of Kentucky and must be enforced as written.

Commonwealth v. Burgess, 28 Rep., 1128; Moseby v. Commonwealth, 113 S. W., 850.

The judgment is reversed with directions to grant appellant a new trial and for further proceedings consistent herewith.

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### **Edelen v. Herman, By et al.**

(Decided February 3, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Number Four).

**Contracts—Parol Contract—Services.**—In an action under an express parol contract for domestic services, where the only issue is not whether there was a contract or no contract, but what was the real rate of compensation agreed upon by the parties, evidence of the real value of the services rendered and of the customary price of similar services at the time and place of the contract, may be introduced; not for the purpose of varying the contract between the parties, but solely for the purpose of aiding the jury in determining what was the real rate of compensation agreed upon.

**SHIELD, CAMPBELL & McATEE** for appellant.

**E. C. WURTELE** and **SAMUEL J. LEVY** for appellee.

**OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

Dora Herman, by her next friend, A. Herman, instituted this action against appellant for a balance claimed under the terms of an express parol contract for domestic services rendered by her in appellant's home for 49 weeks at the contract price of \$10.00 per week.

Appellant answered, not denying the rendition of the services, but claiming they were rendered under another

and different contract by the terms of which he was to pay appellee \$8.00 per month and her board and lodging for such services, and that same had been fully paid.

Appellee is a German girl who, at the time of the contract, had been in this country only a short time, was only sixteen years of age, and spoke very little English; her father came to this country with her from Germany, and he likewise spoke English very indifferently. The father claimed to be a distiller, and hearing that appellant was the owner, or the manager of two distilleries, sought him upon several occasions with a view of procuring employment for himself; upon one of these occasions it developed that he had this daughter for whom he desired to procure employment as a domestic in a home where she would be protected from the temptations of the city.

It is the theory of the plaintiff that at the time of the employment of the daughter by appellant, he also agreed that he would at some future time give her father employment as a distiller at \$75.00 per month, and that when such employment of the father should begin the daughter's wages should be reduced to \$6.00 per week; but that as the father was never given such employment under the terms of the contract, the daughter was entitled to \$10.00 per week for the whole term of service.

It is the theory of the defendant that the father approached him, told him he was anxious to get his daughter in a home where she might be protected, and that appellant told him to bring the daughter to his home and he would let his housekeeper see whether or not she could employ her; that the father and daughter did come to his home and were told that the housekeeper would give her employment, and she would be paid such wages as the housekeeper might think she was worth, after a trial; and that thereafter her wages were fixed by the housekeeper at \$8.00 per month, and this fact was communicated to her father, and that the prospective employment of the father as a distiller had no connection whatever with the employment of the daughter.

Appellee and her father testified to the contract as set out in her pleadings, and appellant and his housekeeper testified to the contract as set out in his answer.

The jury found a verdict for the full amount claimed by the plaintiff, and from a judgment on that verdict this appeal is prosecuted.

Appellee, as stated, was only sixteen years of age at the time, and was a skilled domestic in no particular.

On the trial the defendant offered to prove the real value of the services rendered by the plaintiff, and offered to prove by her former employer that she had been employed by him as a domestic just before she went to defendant's home, and that he paid her \$2.00 per week for her services; that she was unable to speak English except with difficulty, and was an unskilled domestic and was worth only the wages which he had paid her. Treating that as an offer to prove the customary price of services similar to those rendered by the plaintiff at the time and place of performance the question arises, under the state of the pleadings in this case was such evidence competent as tending to show the real contract between the parties?

Manifestly it was not competent to vary the terms of the contract between the parties, but where only the rate of payment for services under the contract was in issue, and there was such wide divergence between the parties as to the contract price, was it not competent as bearing upon which claim was probably correct?

By way of illustration, if a farm laborer should institute an action against his employer and set up an express parol contract by which he was to be paid \$20.00 per day for his labor on the farm, and the employer should answer, admitting the contract except as to the rate of payment, and alleging that under its terms the rate was \$2.00 a day and not \$20.00, can it be doubted that the defendant might show the unreasonableness of the contract asserted by the plaintiff by showing that the customary price for labor, at the time in that community, was \$2.00 per day? And this, not for the purpose of varying or changing the contract, but for the sole purpose of enabling the jury to reach a fair conclusion as to what was the real contract.

The precise question involved here has not been passed upon in this State so far as we have been advised, but we are not without ample authority to sustain our view that the evidence was competent.

In 9th Cyc., pages 767-8, the rule is thus stated:

"Where there is a direct conflict of evidence as to the agreed rate of payment, the actual value of the services rendered, of the property sold, or of materials furnished at the time of making of the contract may be proved, as such evidence tends to show whose contention is probably correct."

And in the note to that text it is said:

"These cases proceed upon the principle that in controversies where a special agreement is alleged on one side and is denied on the other, it is relevant to put in evidence any circumstances which tend to make the proposition at issue either more or less improbable; and this not to change the contract, but as evidence bearing upon the probability that the contention of one party is correct rather than that of the other."

In third Vol. Ency. of Evidence, page 517, we find the rule stated in a different form, to-wit:

"Thus on an issue as to whether or not a contract was made as claimed, any circumstances bearing thereon, or any evidence which tends to render that fact probable or improbable is relevant, provided, of course, the evidence is not otherwise objectionable."

The case of *Campau v. Moran*, 31 Mich., 280 (Cooley, J.), was where Moran sued Campau on a verbal contract to recover the contract price of work done upon a certain structure; the defense set up a very different contract calling for a much more substantial structure. The court, in passing upon the admissibility of evidence that the cost of building the structure in the manner contended for by defendant would be much more than the contract price, said:

"When the parties were thus distinctly at issue upon the terms of the contract, evidence that the cost of performance of such a contract as the defendant set up, would be greatly in excess of the contract price, would certainly afford some reasonable ground for believing that defendant is in error on the facts. We can very well conceive of cases in which such evidence might be forcible."

The case of *Ellis v. Woodburn*, 89 Cal., 129, was where a lawyer sued for a contingent fee under the terms of a contract in addition to the retainer which he had already received; the defendant denied the agreement to pay the contingency, and alleged an express contract upon the part of the plaintiff to render the services for the amount of the retainer, which had been paid, and no more. The court in holding that evidence of the value of the services rendered was incompetent, said:

"If there had been a dispute as to the amount of a contingent fee to be paid, then such evidence would have been relevant as having a bearing upon the probabilities of the case. Testimony as to value or usual price has been frequently admitted in aid of proof of an express

contract, where the only fact in dispute was as to the sum agreed to be paid for services rendered thereunder, or for property sold. The principle upon which the evidence is admitted in such a case is, that proof of reasonable value or usual price has some tendency to show the probable price actually agreed on, that being the fact in dispute."

The Supreme Court of N. H. in *Swain v. Cheney*, 41 N. H., 234, in discussing a similar question, said:

"That there was a contract was admitted, and it would seem that there was no controversy about the terms of it, except as to the agreed price for drawing the lumber between the top of the hill and the depot; and while the plaintiff testified positively, as it would seem, that this agreed price was one dollar and fifty cents per thousand, the defendant probably testified just as positively that the agreed price was but one dollar per thousand. Here, then, there was a single point in dispute for the jury to settle; and as the evidence was conflicting, the jury must find the fact to be either one way or the other, according to the preponderance of the evidence; and if the direct testimony was evenly balanced, then they must consider the probabilities of the case, and weigh them, and thus come to a conclusion. And it seems to us that the evidence offered tended to show what was the common price for conveying that precise kind of lumber over the same road and at the same time, which would, we think, be competent as tending to show whether it was more probable that the price agreed to be paid was one dollar or one dollar and fifty cents per thousand."

There are many authorities to the same effect, but, without quoting them further, it may be said that the decided weight of authority is that where the question is not whether there is a contract or no contract, but what was the real rate of compensation agreed upon by the parties, evidence of the value of the services rendered, and of the customary price of similar services at the time and place of the contract, may be introduced, not for the purpose of varying the contract between the parties, but solely for the purpose of aiding the jury in determining what was the real rate of compensation agreed upon by them.

In this view of the case the evidence offered by the defendant should have been admitted.

For the reason given the judgment is reversed with directions to grant appellant a new trial, and for further proceedings consistent herewith.

**Hughes v. Hughes.**

(Decided February 3, 1915.)

## Appeal from Knox Circuit Court.

1. **Husband and Wife—Divorce—Alimony.**—A married woman who is a non-resident of this State, and who, in a suit by her husband, in a court of this State for divorce, is summoned by constructive process, may at any time within five years from the rendition of the judgment, enter her appearance and file an answer and counter claim, and although she may not interfere with the judgment granting the divorce, she may, by showing that the husband ought not to have been granted a divorce, obtain a judgment for alimony against him, and have any other property rights, which she may have, determined.
2. **Contracts—Compromise—Consideration.**—A compromise of matters of controversy in relation to property, when both parties understand the facts, is a valid consideration for the making of a contract, and a court will not go behind such settlement to determine which party was right in the controversy, and will enforce the contract founded upon the settlement, if it is free from fraud and illegality.
3. **Contracts—Compromise—Rescission.**—A party to a contract which compromises matters of controversy between him and another, if the compromise was fairly made, will not be allowed afterwards to have it set aside, or the contract rescinded, because he finds out that he could have obtained a more favorable settlement in the courts than he did under the compromise contract.

J. M. ROBSION and BLACK, BLACK & OWENS for appellant.

J. D. TUGGLE for appellee.

## OPINION OF THE COURT BY JUDGE HUET—Affirming.

About the year 1880 W. R. Hughes, the appellant, and Mary Hughes, the appellee, were married in Pulaski county, Virginia. They were each residents of that county and State at the time of the marriage, and the appellee continued to reside in Virginia until the month of December, 1908, when she removed to the State of Oklahoma, where she has resided since that time. About the year 1892 or 1893 the appellant went to the State of West Virginia, where he engaged in some business enterprises, and from there to Catlettsburg, Kentucky, and finally came to Bell county and Knox county, Kentucky, in the year 1897 or 1898, where he has since resided.

The evidence for appellee conduces to show that from the time he left home and went to West Virginia, and

up until about the year 1903 or 1904 he frequently visited his wife in Virginia, and kept up correspondence by letters with her, and there was no pretense upon his part that he had abandoned his wife, until the year 1902 or 1903. There was one son as the result of said marriage, who is now a grown man of twenty-six or twenty-seven years of age.

The evidence of appellant conduces to show that he really abandoned appellee in the year 1892 or 1893, and that from that time on to the present time he had no marital relations with the appellee, but continued to send her money from time to time for her support and maintenance. He testified that previous to the year 1902 that he had frequently told her of his intentions to institute an action against her for divorce, but she denies same, and avers that she had no knowledge of his intentions to abandon her, or to sue her for a divorce, until in the year 1902.

Some time previous to July, 1902, he instituted a suit in the Knox Circuit Court against her for an absolute divorce, and procured a warning order to be made against her. She was at that time still residing in Pulaski county, Virginia, which fact was well known to him. At the July term, 1902, of the Knox Circuit Court the court adjudged that he be divorced from her. She testifies that she had no knowledge of the pendency of this suit until shortly before the judgment was rendered, when she learned that the suit was pending (not, however, by the information received from the non-resident attorney in the case), and she thereupon proceeded to make defense to the suit, and had a notice served upon him that she would have depositions taken in her behalf in Virginia. As soon as he became aware of what she purposed to do he came to her house in Virginia, and represented to her that he really had no grounds of divorce to prefer against her, and that he did not intend to obtain a divorce from her, but that he had gotten into trouble with a woman in Kentucky, and that his only way out of it was to institute this suit for divorce, but that she need pay no further attention to it, that he had caused the suit to be dismissed. She relied upon these statements and took no further steps about the matter; that he continued to write affectionate letters to her, as he had always done theretofore, and she did not learn of the fact that a divorce had been granted by the Kentucky court until some months after it had been done.



In these statements she was largely corroborated by her daughter, who resided with her, but they were all denied by him.

It seems that within a few days after the divorce was granted that he married another woman in Knox county, Kentucky, to whom he had caused a house and lot to be conveyed, previous to their marriage. Appellee also learned of these facts. For the purpose of instituting a suit against him for alimony she sent a lawyer from Virginia to Barbourville, Kentucky, to investigate the divorce proceedings, and to take the legal steps necessary to obtain alimony from him. The lawyer negotiated with him about the matter, and the negotiations resulted in the following written contract, which was signed in duplicate, and one copy retained by him and one delivered to the attorney to be given to her. This contract is as follows:

"This contract, Witnesseth: that I. W. R. Hughes, of Knox county, Kentucky, did at the July term, 1902, of the Circuit Court of said county, obtain a divorce from Mary Hughes, my former wife, upon constructive service of process, she being a non-resident of the State of Kentucky, and a resident of Pulaski county, in the State of Virginia, and the said Mary Hughes, contemplating bringing an action against me in the said Circuit Court of Knox county, Kentucky, for alimony, that I agree and bind myself by this contract to pay the said Mary Hughes the sum of thirty-five dollars per month as alimony as long as she shall live, the said sum of thirty-five dollars to be paid to her monthly, and no action for alimony to be brought by her; provided that, if I remain default in the payment of any portion of said monthly allowance of \$35.00 for six consecutive months, the said Mary Hughes may, at her option, demand and have of me thirty-five hundred dollars in full satisfaction of this contract; and provided further, that I may, at any time, if I choose, pay her the sum of thirty-five hundred dollars in full satisfaction of this contract; and I hereby waive all exemptions to which I may be entitled under the laws of the State of Kentucky as to this contract, and agree to pay J. C. Wysor, as attorney for Mary Hughes, the sum of \$100.00 for his services in the premises.

"Witness my hand this 18th day of January, 1903.

"W. R. HUGHES."

It seems that under this contract the appellant did not exercise his right to at once pay her the sum of \$3,500.00 in full satisfaction of the contract, but elected to pay thirty-five dollars every month, as provided in the contract, and while he did not pay the thirty-five dollars each month as the contract provided for, he would at no time allow as many as six consecutive months to expire without having made payment, and this continued until the month of September, 1910, when he made no further payment until the 22nd day of February, 1911, when he paid her the sum of one hundred and five dollars, stating on the check that it was for the amounts due for the months of September, October, and November, 1910. After this date he did not pay nor offer to pay anything until the 10th day of September, 1911, when she received a check from him in payment for the amounts due for the months of December, 1910, and January, February, and March, 1911, but she would not receive this check, and returned it to him. About October 1st, 1911, he forwarded to her another check for two hundred and ten dollars, purporting to be in payment for the months of April, May, June, July, August, and September, 1911. This check she refused to receive and returned it to him. It seems that he was very negligent about making the payments, and she was compelled to write and ask for them; that she did so from time to time. At the first of September, 1911, he having defaulted in the payment for nine consecutive months previous to that time, she determined to exercise her right under the contract to demand from him the sum of thirty-five hundred dollars in full satisfaction of the contract, as provided in it, and at that time she put the matter in the hands of her attorney in Kentucky, and this is the reason she gives for not accepting the check of September 10th and October 1st, believing, as she says, suit had already been instituted.

She instituted this suit in the Knox Circuit Court to recover from him thirty-five hundred dollars mentioned in the contract. To this suit he filed an answer pleading that the contract was fully satisfied by the payment of the thirty-five hundred dollars, and that he had already paid thirty-three hundred dollars in monthly payments under the contract, and for that reason he was only due to pay two hundred dollars more, which he was willing to confess.

He also pleaded that the contract was without consideration, and for that reason nothing could be required of him under it. He likewise pleaded that the thirty-five hundred dollars, for which he was sued, was a penalty and not enforceable. He also set up and pleaded as a set off a note for the sum of \$1,882.00, which he claimed she had executed to him on July 1st, 1893, and which was due three years after date, with interest at six per cent per annum from date, and asked that same be set off against any judgment which she might recover against him. A further plea interposed was that the appellee had made her son an agent for her to collect and send the monthly payments to her and that the son had failed to send the money to her, although he had a right to check upon appellant's funds and appellant had authorized him to do so.

She filed a reply in which she pleaded that the note was without consideration, and, furthermore, that it was executed and delivered to him when they were both citizens and residents of the State of Virginia, and was to be paid in the State of Virginia, and that she had remained a resident of the State of Virginia until the month of December, 1908, and that recovery on the note was barred by the statute of limitations on the first day of July, 1901, alleging also that the period of limitations upon a note of that character was five years from the time it became due, under the statute of Virginia. She also plead that it had been due more than fifteen years before the filing of this suit, and recovery upon it was therefore barred by the statute of limitations in the State of Kentucky. By rejoinder the appellant controverted the affirmative allegations in the reply, and upon these issues considerable proof was taken, a large part of it being directed as to whether or not the note plead in the set off by the appellant was or was not without consideration. The case being submitted in the trial court below, the court adjudged that the appellant had failed to manifest his right to have a judgment upon the note plead as a set off, and furthermore adjudged that the appellee recover of the appellant the sum of thirty-five hundred dollars, as sued for, with six per cent. interest per annum thereon from September 18th, 1911, the date of filing the suit, until paid, and her costs expended. From this judgment the appellant has appealed to this court.

There is no controversy as to the fact that appellant had remained in default in the payment of the monthly payments for six consecutive months at the time appellee elected to demand the thirty-five hundred dollars in full satisfaction of the entire contract. While on the 10th day of September she had received a check purporting to pay the monthly payments up to and including March, 1911, it, therefore, left him in default as to the five months of April, May, June, July, and August, when his contract provided, and what he had elected to do under the contract, to make a payment each month, and the reception of the check was after she had put the matter in the hands of an attorney with directions to institute a suit, which was filed thereafter on the 18th day of September. She, by her attorney, before the reception of said checks, had demanded of appellant the thirty-five hundred dollars.

In support of the contention that the writing sued upon was without consideration, the appellant, by counsel, argues that he at the time had been divorced from appellee for over six months, and that he was under no obligation to pay her alimony, and could not have been required to do so by law, and for that reason the writing is not enforceable. In support of this contention he cites statute 2122, Kentucky Statutes, which is as follows:

"If the wife have not sufficient estate of her own, she may on a divorce obtained by her have such allowance out of that of her husband as shall be deemed equitable, and be restored to the name which she bore before marriage, if she may desire it."

While this court in the case of *Campbell v. Campbell*, 115 Ky., 656, held that where the wife was the plaintiff in an action for divorce, and sued and obtained a divorce from her husband, that she could not thereafter maintain another suit for alimony against her husband, and obtain a judgment against him for alimony, unless she had claimed alimony, or made some reservation in the judgment of divorce concerning future support, in the suit in which she recovered the divorce.

In the case of *Davis v. Davis*, 86 Ky., 32, this court held that where a husband had instituted a suit for divorce against the wife, and that the suit had gone to judgment in favor of the husband, where the wife entered her appearance, and defended the suit, that while

the judgment for divorce cannot be questioned on appeal, nor set aside, but if it appears that the divorce was wrongfully obtained by the husband, it would not bar the wife from recovering alimony in that suit, and that she could not be deprived of her alimony simply because the divorce was not obtained by her, as should have been the case.

This court also held, in the case of *Butler v. Butler*, 4 Littell, 206, and in *Hulette v. Hulette*, 80 Ky., 364, that in as much as the marital obligation imposed on the husband the duty of supporting and maintaining the wife, in a case where the husband had abandoned the wife, or where the treatment of her was such as to compel her to leave him, she could maintain a suit for maintenance against her husband without actually instituting a suit for divorce.

In this case it is not necessary for the court to inquire as to which of the parties was at fault as to their separation; but the fact that the husband obtained a divorce on the 31st day of July, and married again on the 10th of August following, is rather indicative of the fact that he was not free from fault in the matter of their separation.

The suit he instituted was in the State of Kentucky, against his wife, whom he knew lived in the State of Virginia, and he only had constructive process against her.

While it is true that, under Section 414 of the Civil Code, a defendant in an action for divorce cannot within five years after the rendition of the judgment, move to have the action retried, and be admitted to make defense as if there had been no judgment, but by analogy to the case of *Davis v. Davis*, *supra*, she did have a right within five years to reopen the case to the extent of showing that the divorce had been wrongfully obtained, and to secure her property rights in spite of the judgment for divorce. The concluding portion of this statute is very significant when it says, "but this section does not apply to judgments for divorce, so far as the divorce is concerned."

This court held, in the case of *Lacey v Lacey*, 95 Ky., 110, that the wife's right to alimony was not confined to cases where the action for divorce was instituted by her, and that where the wife is entitled to a divorce, although the action is instituted by the husband, she is entitled to

alimony, and Section 2121, Kentucky Statutes, says: "Upon final judgment of divorce from the bonds of matrimony the parties should be restored such property not disposed of at the commencement of the action as either obtained from or through the other before or during the marriage in consideration thereof."

Construing all of these sections together, we see no good reason in the contention that because the husband instituted the suit for divorce, and, without actual warning to his wife, and did obtain a divorce, that it should preclude her, being a non-resident, from the same processes of law which other persons have, to come into court within the period of five years after the rendition of the judgment, and relitigate the matters in issue, or the ones which she has a right to put in issue, where her right to do so is not clearly prohibited by the statute.

If the evidence for appellee in this case is true, it appears that the judgment for divorce was obtained by the appellant by fraudulently representing to appellee that the suit had been discontinued, and thus causing her to rest in supposed security, until his object was obtained in getting rid of appellee as his wife, and marrying another woman.

In as much as the appellee had a right to reopen the suit of her husband against her for divorce to the extent of filing an answer and counter-claim, and asking alimony of him, there was then an actual controversy between appellant and appellee, which they could adjust by a settlement between themselves.

Appellant in his deposition first states that the attorney for the appellee, who came to see him from her home in Virginia, said to him, that if a satisfactory arrangement could not be made for the protection of the rights of the appellee, that she would institute a suit against him, or, in substance, to that effect. Appellant and appellee had a right then to adjust their differences by mutual agreement and compromise of the matters in controversy between them, and, if the parties understood the facts, it does not matter if afterwards one of them should find out that he or she could have obtained a better settlement in the courts than was agreed upon.

This court held, in *Taylor v. Patrick*, 1 Bibb., 168, "that the compromise of a doubtful claim is a good consideration to uphold a contract, and it is immaterial on which side the right ultimately turns out."

In the case of *Fisher v. May's heirs*, 2 Bibb., 448, this court held: "That the compromise of doubtful claims is a good consideration to uphold a contract, and the court will not investigate the relative merits and demerits of the two claims for the purpose of setting aside the compromise." The law allows the settlement of disputed questions, both as to law and facts, by the parties by their mutual agreement, and if both parties are capable of contracting, and understand the facts, it would be idle for them to make a compromise settlement, if one or the other could thereafter escape his obligations in the settlement by showing that he was right in regard to the controversy.

It was in settlement of the disputed rights of appellant and appellee that the paper sued on was executed, and the contract in it made. We think that this is a good and valid consideration for its execution.

The contention of appellant that his son, S. Davis Hughes, was the agent of both he and the appellee, and that he had intrusted to him the sending of the payments to his mother, and if he had failed to do so, that was her fault, and not that of the appellant, is clearly without merit. S. Davis Hughes was the bookkeeper and servant of appellant, and, while he made out the checks which were sent by him to the appellee to make the monthly payments to her, he performed the same labor for his father in sending checks to other persons with whom he had business transactions, and we find no evidence in the record which would show that he had ever been made the agent of appellee, and it would be difficult for him to be the agent of his mother to collect the money and the agent of his father to refuse to forward it. It was the duty of the appellant to make these payments, and however his son may have been the agent to receive them, which it does not appear that he was, he was the agent of his father to send them, and if he failed to do so, it was the fault of the appellant.

The contention of appellant that the condition in the contract that, in the event he should fail for six consecutive months to make the payments, that the appellee had a right to require him to pay her thirty-five hundred dollars, is a penalty, and is not enforceable, is also, in our opinion, without merit. It was plainly evident that the contract was intended to be a means of support to the appellee for and during her natural life, and that

she should have a payment of thirty-five dollars a month for each month during her natural life, and the writing expressly provides that the appellant shall pay her thirty-five dollars each month, and he is given, at the beginning, the choice of paying to her a gross sum of thirty-five hundred dollars in satisfaction of the entire contract upon his part, or to pay her thirty-five dollars a month for every month during her natural life. He elected to pay thirty-five dollars per month, but when he did so, he could not escape the plain provisions of the contract, that he should pay her thirty-five hundred dollars, if she elected to accept that in full satisfaction of the contract, when he had been in default for six consecutive months.

These obligations were reciprocal, the one being that the appellant could discharge the entire contract by paying thirty-five hundred dollars at once, and, in that state of case, the appellee was obliged to receive it; and the other condition is that in certain states of case she may demand thirty-five hundred dollars in full satisfaction of the contract, and the obligation certainly rests upon the appellant to pay it. It is not that appellant shall pay thirty-five hundred dollars because he fails to pay two hundred and ten dollars, as contended by him, but in the event he is in default, he shall then pay at once the sum which the parties seem to have considered a sufficiency to maintain appellee during the remainder of her life.

In Volume 13, Cyc. of Law and Procedure, page 90, it is stated as follows: "As to when a sum agreed upon is to be paid as damages for the violation of an agreement should be considered as liquidated damages, or only as a penalty, is held to depend upon the meaning and intention of the parties as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject matter of the agreement. The contract is to govern; and the true question is, what was the contract? Whether it was folly or wisdom for the contracting parties to thus bind themselves is of no consequence, if the intent is clear. If there be no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement. In order to determine whether the sum named in a contract as a forfeiture for non-compliance is intended as a penalty or as liquidated damages, it is neo-



essary to look at the whole contract, its subject matter, the case or difficulty in measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach."

There can be no question about the contract in the case at bar. There is no fraud, circumvention, or illegality hinted at in reference to it. It certainly does not mean, as the appellant contends, that in no state of case only thirty-five hundred dollars shall be paid.

It was for the benefit of the appellant that he had the choice in the beginning, and if he then saw fit afterwards to discharge his entire obligation by paying thirty-five hundred dollars, the appellee was bound to receive that; but after appellant chose to pay thirty-five dollars each month, as the agreement stated he might, he could not, by so doing for his own benefit, stretch out the payments from year to year, and then become in default of the payments, and require appellee then to accept thirty-five hundred dollars, less what he had already paid her by the month.

We know of no rule for determining the probable consequences of the breach of this contract, as to the appellee, or what she would suffer by it, because it is impossible to determine the length of her years, except the probable length estimated by the tables of mortality, and for that reason it could not be considered that the thirty-five hundred dollars was a penalty for the failure of appellant paying six monthly payments under this contract. Looking at the whole contract, it is impossible to fail to see that it was agreed and understood that in the event the appellant should be in default, that the amount agreed upon by them as a settlement of the breach should be thirty-five hundred dollars, and it is apparent, from the nature of the case, and the tenor of the agreement, that, in the language of the Cyc. of Law and Procedure, page 90, *supra*, "that the damages when the contract was made was the subject of actual and full calculation and adjustment between the parties." The consequences of a breach of this contract by appellant would have been that he would have escaped the payment of the monthly payments for the remainder of the life of appellee, and appellee would have lost them, and the probable consequence is that the amount of

money which would have been saved by appellant and lost by appellee would have amounted to the sum sued for, or practically so.

The appellant also complains that the court refused to give him a judgment upon the note, which he plead as a set off. To this the appellee interposed two pleas, the one, want of consideration, and the other the statute of limitations. Upon the subject of want of consideration the appellee testifies, and in that she is corroborated by her daughter, that when this note was executed that the appellee received nothing in consideration of it; that appellant represented to her that he was in a great financial difficulty, and that if she would execute the note that he could use it as a security, and save them from losing all of the property that he had, and that she should never have it to pay, and that he never called upon her to pay it; that he had said to her fifty times that the note had been destroyed, and that she should never hear of it; and the fact that when the agreement sued on was made, and all of the payments made under that agreement, without appellant ever having undertaken to collect it, or said anything about it, very strongly conduces to show that the appellee is right in her contention upon that subject. The statement of appellant that the note was given to him in consideration of his conveying the property that he owned in Virginia to the appellee, and that she executed to him a mortgage upon the property to secure the note, which mortgage is copied in the record, strongly indicates that the appellant is right in regard to the consideration for the note. It does not seem, however, that the appellant regarded the ownership of it as of any particular value to himself, since he never had the trust deed recorded in Virginia, and he does not call upon any of his neighbors in Virginia to prove the truth of his assertion, when it is evident that he could have done so easily, if they would bear out his statements, makes the transaction as being one in good faith, and for a valuable consideration, extremely suspicious.

The chancellor below was the judge of the weight of all of this evidence, and if he refused a judgment upon the note, by reason of his belief that it was without consideration, it is not so flagrantly against the evidence that we would feel justified in determining the issue otherwise. This note, if valid, was executed on the first

day of July, 1893, and was due three years thereafter, which would be the first day of July, 1896, and, whether the law of the place where the note was made, or the law applying in this State as to limitation of an action upon a promissory note is to be applied to this one, recovery upon it is barred by the statute of limitations in either jurisdiction. Under the statute of Virginia, recovery upon a note of this character, according to the evidence, is barred by the statute of limitations five years after it becomes due. Therefore, it would have been barred in the State of Virginia on the first day of July, 1901, and the contention of appellant that under the statute of Virginia that recovery upon it would not be barred because the appellee removed from the State of Virginia in the year 1908, is without merit, because it would have already been barred seven years before she removed. The statute in Kentucky would prevail against recovery upon it fifteen years after it became due. It seems that more than fifteen years had expired from the time it became due until action was brought upon it.

It is, therefore, not necessary to determine whether the law of the place or the law of the forum applies in this action.

For the foregoing reasons the judgment appealed from is affirmed.

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### Ray v. Ellis, et al.

(Decided February 3, 1915.)

#### Appeal from Jefferson Circuit Court (Chancery Branch, First Division).

1. Judgment—Premature Rendition—Motion to Set Aside—Evidence.—On a motion to set aside a judgment on the ground that it was prematurely rendered, evidence considered, and held to sustain the finding of the chancellor that the judgment was not prematurely rendered.
2. Judgment—Personal Judgment on Note—Lien on Stock Pledged.—In an action on a note secured by stock of an insurance company which has been absorbed by another company by an arrangement whereby the latter was to issue its stock in lieu of the stock of the company absorbed, it was error to render personal judgment on a note, and direct that the new stock be issued to plaintiff's attorney; the judgment should have adjudged

plaintiff a lien, and ordered a sale of the stock by the commissioner after due advertisement.

JOHN W. RAY and DAYTON T. MITCHELL for appellant.

M. W. RIPPY for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

On November 1, 1912, John W. Ray executed to A. L. Edwards his promissory note for \$2,000, payable in six months, and secured by 200 shares of stock of the Inter-Southern Life Insurance Company. The note was sold, transferred and assigned to T. B. Ellis. By mistake suit was brought on the note on March 18, 1913, in the name of A. L. Edwards, instead of T. B. Ellis, the assignee. The action was never set at rules, and was dismissed without prejudice on July 17, 1913. The next day Ray filed in the clerk's office an answer and counter-claim.

The Inter-Southern Life Insurance Company has taken over the assets of the Southern National Life Insurance Company under an arrangement by which it was to issue its own stock in lieu of the Southern National Life Insurance Company stock.

On September 26, 1913, this action was brought by plaintiff, T. B. Ellis, the assignee of the note, against the defendant, John W. Ray, and the two insurance companies, to recover on the note, and to enforce his lien on the stock. The insurance companies were made parties for the purpose of having the Inter-Southern Life Insurance Company issue its stock in lieu of the Southern National Life Insurance Company's stock which had been deposited as collateral security. Demurrers were filed by the two insurance companies, but without authority. The case was regularly set at rules, and, upon the calling of the docket on November 20, 1913, Ray filed a plea in abatement, setting out the pendency of the former action, and filing as exhibits the petition, answer and counter-claim filed in that action. On November 8, 1913, the action was again set at rules, and a reply to the plea in abatement filed. On May 11, 1914, long after the time for taking proof had expired, the case was regularly set at rules, called upon the docket, and submitted. The first record was sent out with the case, and, on the Saturday following the submission, Judge

Quarles directed the preparation of a judgment. The draft of the judgment was prepared and taken up by the court in chambers. The reason that Ray's attorney was not notified was that he had told plaintiff's attorney that he intended to have nothing more to do with the case. Ray's attorney, however, was notified that plaintiff intended to take judgment. When the draft of the judgment was submitted to Judge Quarles it was discovered that, by oversight, the note and the stock certificates had not been actually filed. On June 25, 1914, the order of submission was set aside to enable plaintiff to file the exhibits. The exhibits were then filed, and the action again submitted in chief. On June 27, 1914, judgment was rendered. During the vacation, and within sixty days after the judgment was rendered, defendant Ray asked for a new trial, and that the judgment be set aside. The foregoing facts were established by the affidavits filed by plaintiff. The defendant introduced no proof to the contrary. Defendant's motion for a new trial and to have the judgment set aside was overruled. When the motion was made, defendant did not tender an answer showing a defense to the action, but stated in his grounds that he had a defense as shown by his answer and counter-claim filed in the action brought on the note by A. L. Edwards. Defendant Ray insists that the submission of the case in chief was premature, because he had a right to have a decision on his plea in abatement, and an opportunity to defend on the merits after that plea was disposed of. Of course, the plaintiff in the first action brought on the notes had a right to dismiss that action without prejudice at any time before its final submission. Civil Code, Sec. 371; *Vertrees' Admr. v. Newport News, &c. Co.*, 95 Ky., 314; *Wilson v. Dupree*, 24 Ky. L. R., 1456, 71 S. W., 645; *Citizens Nat. Bank of Danville v. Foreman's Assignee*, 111 Ky., 206; *Wilson v. Milliken*, 103 Ky., 165, 42 L. R. A. 449, 82 Am. St. Rep., 578. As that action has been dismissed without prejudice, a simple inspection of the records in the clerk's office was all that was necessary to show this fact. As a matter of fact, no action on the note in question was pending, and it is, therefore, difficult to see how defendant could have been relying on the pendency of another action to defeat this action. The case was submitted in chief, and defendant's attorney was notified of the fact that judgment would be

taken. When the case was set down for submission in chief, it was defendant's duty to know of this fact. If the attorney whom he was employing was no longer attending to the case, then he should have secured another attorney or looked after the matter himself, since he is also a practicing attorney. Furthermore, defendant did not tender with his motion to have the judgment set aside a good and sufficient answer, nor did he tender such an answer before the motion was finally disposed of. He simply stated in his motion and grounds that he had a good defense, as shown by the answer and counter-claim filed in the original action brought by A. L. Edwards. In view of these facts we see no reason for disturbing the finding of the chancellor, who refused to set aside the judgment on the ground that it was prematurely rendered.

Defendant, however, insists that the judgment itself was erroneous. It first adjudged a recovery in favor of plaintiff for the sum of \$2,000, with six per cent. interest from the date of the note. It further directed the Inter-Southern Life Insurance Company, in the event of Ray's refusal to endorse the certificates, to issue new certificates of its own stock in lieu of the stock of the Southern National Life Insurance Company, and that this stock be issued to plaintiff's attorney. Manifestly, the effect of the judgment is to give plaintiff the stock without giving defendant Ray any credit therefor on the personal judgment obtained against him. The judgment should have adjudged plaintiff a lien and directed a sale of the stock by the commissioner after due advertisement.

Judgment reversed and cause remanded, with directions to enter judgment in conformity with this opinion.

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### Nickell, et al. v. Johnson.

(Decided February 4, 1915.)

#### Appeal from Wolfe Circuit Court.

1. Statute of Frauds—Contracts.—The Statute of Frauds (Section 470, Subsection 7, of the Kentucky Statutes), which prohibits the bringing of an action upon an agreement which is not to be performed within one year from the making thereof, refers to a contract which, by its terms, is not to be performed within a

- year, and which, from its very stipulations, is not capable of being performed within a year.
2. Statute of Frauds.—If a contract is capable of being performed within a year it is not within the Statute of Frauds.
  3. Contracts.—The early rule was that any contract which tended to restrain trade was void; but the rigor of that rule has long since been relaxed, so that contracts in reasonable restraint of trade are now recognized as valid.
  4. Contracts—Restraint of Trade.—A contract in restraint of trade will be enforced only when the restraint is no more extensive than is reasonably required to protect the interest of the party in whose favor it is given, and is not so large as to interfere with the interest of the public.
  5. Contracts—Sale of Business—Agreement Not to Engage in Business.—A contract by which the defendant sold his stage line business to the plaintiffs for a valuable consideration, and agreed not to again engage in that business between the points covered by his former stage line, and not to compete with the plaintiffs in said business, is a valid contract, and will be enforced by injunction proceedings against the defendant.

S. MONROE NICKELL for appellant.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Reversing.

This appeal involves the correctness of the judgment of the circuit court which sustained a demurrer to plaintiff's petition, and subsequently dismissed it upon appellant's failure to amend it.

Briefly stated, the petition alleges that prior to December 1, 1912, the appellant, Nickell, and the appellee, Johnson, were partners engaged in running a stage line for the carriage of passengers and the United States mail between Hazel Green and Hellechawa, towns in Wolfe County about six miles apart; that in December, 1912, Johnson announced his intention to leave Kentucky and go west, and offered to sell out his half interest in the stage line to his partner, Nickell, and to Coldiron, who was running a rival line between the same points; that the plaintiffs, Nickell and Coldiron, accepted Johnson's proposition by buying his interest in said hack line, including his good will, and his interest in the partnership and the business in which they were engaged, Johnson reserving to himself his two horses and hack which he had used in the business; and that the consideration for said trade was \$20.00 in cash and the agreement of appellants to carry the mail and release Johnson from any liability upon that undertaking. The petition further

alleges that Johnson agreed not to operate or run a stage line or carry passengers or express between said points, or intervening points, at any time while the said Nickell should continue the business between said points, and that the said Johnson would conduct no business between said points in opposition to or in competition with the plaintiffs Nickell and Coldiron.

It is further alleged that it was not the object or purpose of the parties to said contract to raise or increase the rates charged for carrying passengers, freight or express between said points, and that plaintiffs had not increased said rates, which were only reasonable and compensatory charges for the services rendered. Nevertheless, according to the petition, Johnson broke his contract by placing his hack back on said road and carrying passengers between said points in competition with the appellants, and to their damage in the sum of \$500.00. The petition prayed judgment against Johnson for \$500 and for an injunction restraining him from either directly or indirectly operating or running a hack or carriage in violation of his contract.

Since the circuit judge assigned no ground for sustaining the demurrer to the petition, we can only conjecture the reason for the ruling.

The demurrer could not have been sustained upon the theory that the contract was in violation of the Statute of Frauds, in that it was not to be performed within one year. It is true the contract specified no time for its duration; but that did not make the contract unenforceable.

The Statute of Frauds (Section 470, sub-section 7 of the Kentucky Statutes), which prohibits the bringing of an action upon an agreement which is not to be performed within one year from the making thereof unless the contract be in writing, refers to a contract which, by its terms, is not to be performed within a year, and which, from its stipulations, is not capable of being performed within a year.

. In *Stowers v. Hollis*, 83 Ky., 548. the rule is stated as follows:

“If the performance of a contract depends upon a contingency which may happen within a year, then it is not within the statute, although that contingency may not in fact happen until after the expiration of the year; and although the parties may not have expected that it



would occur within that period. It is sufficient if the *possibility* of performance existed."

If the contract is capable of being performed within a year, it is not within the statute. To illustrate: If A agrees to pay B \$100.00 when B marries, the agreement is not within the statute, because the time of performance is not fixed in the contract at a period beyond a year. So, a contract to provide for one during his life is not within the statute, for the same reason. In these illustrations there is nothing in the contracts to preclude their performance within a year by fixing their time of performance beyond a year. These illustrations are taken from *Dickey v. Dickinson*, 105 Ky., 751, 88 Am. St. R., 337, where Dickey, the plaintiff in the circuit court, had bought from Dickinson his one-third interest in the "Glasgow Times" newspaper, Dickinson having obligated himself not to again engage in the newspaper business in the town of Glasgow. Dickinson violated his contract by starting a rival newspaper, whereupon Dickey sued to enforce his contract. That action is in principle on all-fours with the case at bar. In *Dickey v. Dickinson*, the circuit court dismissed the petition on demurrer, as was done in the case at bar; but in reversing that judgment the court said:

"A contract not to again engage in publishing a newspaper in a given place is a personal contract not to do so during the life of the party so contracting; and, if his death ensue without his having done so, the contract is fully performed. Such a contract does not fix in terms a time certain for its performance, and hence it cannot be said that it fixed the time for performance beyond a year. The time is left open by the parties, and, if death may fulfill it or effect its performance within a year, the contract is not within the statute."

*Dickey v. Dickinson* was followed in *Yellow Poplar Lumber Co. v. Rule*, 106 Ky., 455, where it was held that a contract to employ the plaintiff so long as defendant was engaged in the saw mill business on the Ohio River was not within the Statute of Frauds, the contract being possible of performance within a year. To the same effect see *McDaniel v. Hutcherson*, 136 Ky., 415; *Ford Lumber & Mfg. Co. v. Cobb*, 138 Ky., 179; *American Central Ins. Co. v. Leake*, 31 Ky. L. R., 1018.

Neither do we think the contract was illegal as being in restraint of trade. The early rule was that any contract which tended to restrain trade was void; but the

rigor of that rule has long since been relaxed, so that now the rule is that contracts in reasonable restraint of trade are recognized as valid. *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky., 540; 30 L. R. A. (N.S.), 973.

Covenants in partial restraint of trade are now generally upheld as valid when they are agreements by a seller of business not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner not to compete with the firm; by a retiring partner not to do anything to hinder the business of the partnership; by an assistant or agent not to compete with his master or his employer after the expiration of his term of service; by the buyer of property not to use it in competition with the business retained by the seller; or an agreement made by the lessor of property not to use it in competition with the business of the lessee. It is a general rule, however, that all contracts of this character must be incident to and in support of another contract or sale in which the covenantor has an interest which is in need of protection. *Barrone v. Moseley Bros.*, 144 Ky., 698; *Sutton v. Head*, 86 Ky., 156; *Louisville Board of Fire Underwriters v. Johnson*, 133 Ky., 797.

The reason for the rule was well stated in *Clemmons v. Meadows*, 123 Ky., 181, 6 L. R. A. (N. S.), 847, as follows:

“Such contracts are intended to secure to the purchaser the good will of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint to be valid must (not) be more extensive than is reasonably necessary for the protection of the vendee, in the enjoyment of the business which he has purchased. In this class of cases the court recognizes that the vendor has received an equivalent for his agreement to partially abstain from business at the place where his business was formerly conducted. In such cases the agreement does not contemplate that the business or trade purchased shall be discontinued and thus perhaps throw out of employment those whose services were necessary to carry on the business; but, on the contrary, it is contemplated that the business will be-carried on and that the public will continue to receive benefits which may accrue from the conduct of the business. It results that the agreement does not have the effect of depriving the public of any benefits which it has enjoyed from the conduct of the business, or pursuit of the trade which has been

transferred to another. Such contracts do not have the effect of destroying the competition which existed by reason of which the public enjoyed benefits."

Or, as the rule was summarized in *Barrone v. Moseley Bros.*, *supra*, "a contract in restraint of trade will be enforced only when the restraint is no more extensive than is reasonably required to protect the interest of the party in whose favor it is given, and is not so large as to interfere with the interests of the public."

*Linneman & Moore v. Allison & Yates*, 142 Ky., 309, is in point. In that case Menninger sold his livery and undertaking business, together with his good will, to the plaintiffs, and agreed not to engage in the same business within fifty miles of the place where the business was located for a period of ten years. In response to the contention that the contract should not be enforced against Menninger because it was an undue restraint of trade, this court said:

"Nor will Menninger be deprived of an opportunity to pursue his business, or the country be deprived of the benefits of his exertions; for, outside of the restricted boundary there is plenty of territory left wherein he may engage in business; and at the expiration of the time limit he may also engage in business in the city of Covington. We, therefore, conclude that the restriction contained in the contract in question is reasonable, and that the chancellor properly granted the relief prayed for."

There are many cases to the same effect. The facts stated in the petition fully satisfied both rules above announced.

We conclude, therefore, that the petition in the case at bar stated a cause of action, and the demurrer thereto was improperly sustained.

Judgment reversed with instructions to overrule the demurrer to the petition and for further proceedings.

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## Oak Grove Missionary Baptist Church, et al. v. Rice.

(Decided February 4, 1915.)

### Appeal from McCracken Circuit Court.

1. **Easements—Passway—Consideration.**—Where the trustees of a church are granted the use of a passway to the public road in consideration of the construction of a road over such passway,

and continue to use the passway for a period of fifteen years as a matter of right, they acquire an indefeasible right to the passway as it existed during that time and may enjoin its obstruction.

2. **Easements—Obstruction—Evidence.**—In an action by plaintiffs to enjoin the obstruction of a passway, by the erection of gates thereon by the owner of the land, evidence examined, and held that such gates were not reasonably necessary for the protection of defendant's land, and were an obstruction to the passway.

S. E. CLAY and JOHN G. LOVETT for appellants.

HENDRICK & NICHOLS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Plaintiffs, as trustees of the Oak Grove Missionary Baptist Church, brought this action against the defendant, Jesse M. Rice, to enjoin the obstruction of a passway. From a judgment denying them the relief asked plaintiffs appeal.

The facts are these:

The church property was originally located in unenclosed woodlands. There were three or four routes to the church from the adjacent public roads. About 18 or 19 years ago, when the adjoining landowners began to enclose their land, a committee from the church approached the defendant with a view of securing a passway from the church to the Woodville and Paducah gravel road. According to the evidence for plaintiffs, Rice told the committee that if they would cut out a road, the church members could use it, and he would use it too. Thereupon the colored people went to work, and, under the direction of defendant, chopped down the trees and made the road. The road for the distance was fenced up on each side. The road was several hundred yards in length. After going beyond the church property it turns off towards the defendant's house. The fence on the west side was constructed by Mr. Rice. The fence on the east side was constructed by Mr. Pippin. Mr. Pippin, in constructing his fence, set it back two or three feet. His purpose was to give that much land for the benefit of the road. The road as thus built and defined by the two fences throughout its entire route has been used by the church members and the people who attended the church for about 18 years. During that time no gates were placed across the passway.

About a year and a half or two years before the bringing of this action, defendant constructed two gates, one about 150 yards from the public road, and the other about 100 yards nearer the church. Posts were placed on the east side of the road, and the two gates obstructed the entire right of way, which was 16 feet in width. After these obstructions were erected a committee of the church, desiring to avoid any misunderstanding in regard to the matter, attempted to purchase the ground for a passway, but these negotiations fell through.

The evidence for the defendant differs from that of the plaintiffs in one particular only. While admitting that they blazed and constructed the road, he claims that he told them that they could use the right of way so long as it did not inconvenience him. Defendant himself has made an occasional use of the road since it was established.

The chancellor denied the relief prayed for on the ground that the gates were not, under the circumstances, an unreasonable obstruction. Defendant insists that this judgment was right because the uncontradicted proof shows that the use of the road was merely permissive. Taking into consideration all the circumstances of the case, we are not inclined to hold that these old colored people, who suffered the other routes to the public road to be closed, and who knew that the passway in question was therefore their only outlet to the public road, went to work and built the road in question with the understanding that the defendant could close it at any time that he saw fit. The case is not one of permissive use alone. It is a case where the right of way was given in consideration of the labor performed in the construction of the road. Being by parol only, the agreement was within the statute of frauds, and might at any time within fifteen years have been rescinded upon equitable terms. For a period of more than fifteen years, however, no attempt was made to rescind the agreement or to interfere with the passway that had been given. On the contrary, the members of the church, who had paid a valuable consideration for the easement by constructing the road itself, continued to use the road for more than fifteen years under a claim of right. We, therefore, conclude that they acquired an indefeasable right to the passway, as it existed during said period of time. The gates in question

were placed across the roadway after the fifteen years had elapsed. They were not placed at points where the passway entered or left the land of defendant. They were placed about 150 and 200 yards from the mouth of the passway. Nor does it appear that they were reasonably necessary for the protection of defendant's land. The only real effect of the gates was to operate as an obstruction to the passway. Under these circumstances, we conclude that plaintiffs are entitled to the relief asked.

Judgment reversed and cause remanded, with directions to enter judgment in conformity to this opinion.

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### **Lawrence v. Board of Councilmen of the City of Frankfort.**

(Decided February 4, 1915.)

#### **Appeal from Franklin Circuit Court.**

**Evidence—Paper Releasing Claim for Damages—Mistake in Execution of—Instructions.**—Where a person who was injured by the alleged negligence of two parties received from one of them after suit was brought a certain sum in settlement of his claim for damages and executed a writing to this effect, the writing, unexplained, would be a bar to the prosecution of the action, but where it appeared from the evidence that it was the intention of all parties that the paper was only to release the one to whom it was given, the court properly instructed the jury that they should find for the other defendant unless they believed that the paper was only intended to be a release as to the one to whom it was given.

J. HUNT JACKSON and BROWN & NUCKOLS for appellant.

F. M. DAILEY for appellee.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

The appellant, Lawrence, as plaintiff, brought this suit against the Board of Councilmen of the City of Frankfort and Henry Ringold to recover damages for personal injuries sustained, as he alleged, by the failure of the city and Ringold to keep the sidewalk in front of Ringold's store on St. Clair street in a reasonably safe condition for travel.

The suit was not prosecuted as to Ringold for reasons that will be presently stated, and on a trial before

a jury on the issues made with the city, there was a judgment for the city, and Lawrence appeals.

In its answer the city, after denying that the sidewalk was in an unsafe condition for travel, pleaded in bar of the action the execution of a paper signed by Lawrence in which he accepted \$25 paid him by Ringold "in full for all damages received by me and upon which suit has been brought because of the fall on the sidewalk in front of said Ringold's store on St. Clair street."

In avoidance of this paper, which was a settlement of the damage suit pending at the time the paper was executed, Lawrence, in a reply, averred that it was intended and understood by Ringold and himself that the paper was only a settlement of the claim for damages so far as Ringold was concerned and that the words quoted were inserted in the receipt by mutual mistake and oversight on the part of himself and Ringold, as it was not intended by either of them that the payment should be received as satisfaction in full of his cause of action.

On a trial of the case there was some evidence that the sidewalk at the place where Lawrence claimed to have fallen was not in a reasonably safe condition for travel, but the decided weight of the evidence both numerically and in probative value was to the effect that the sidewalk was in a reasonably safe condition for public travel; so that, under the evidence upon this issue, the jury could not very well have found a verdict for Lawrence.

It is said, however, that certain errors of law were committed by the trial court that entitle the appellant to a new trial. One relates to the evidence of a witness named Sharp who was in front of Ringold's place of business at the time Lawrence received the injuries complained of, and who was permitted to testify as to the condition of the sidewalk, but not allowed to say that "I made a slip there." Whether he made the slip at the exact place where Lawrence claims to have fallen does not appear; and, for this reason, if no other, we think the court correctly excluded so much of his evidence as attempted to relate the fact that he had slipped there.

Concerning the paper relied on by the city in bar of the action, the evidence of Ringold, Lawrence and Edwards, the only parties who knew anything about the

execution of this paper, was to the effect that all of them intended the paper as a settlement only of the claim of Lawrence against Ringold and that the \$25 was not paid or received in settlement of his suit for damages or in settlement of his claim against the city, although the paper itself showed that it was in settlement of his suit for damages, and was a good defense to this action against the city.

With the pleadings and evidence in the condition stated, the court told the jury that they should "find for the defendant (city) unless they believed from the evidence that the receipt and release for \$25 given to Ringold was only intended by plaintiff and Ringold as a partial settlement of plaintiff's claim for damages, and was not intended for a full settlement of his entire claim for damages."

It is said that the court, in place of giving this instruction, should have told the jury that if they assessed any damages in favor of Lawrence they should credit it by \$25, the amount paid by Ringold. We think, however, the instruction of the court aptly presented to the jury the issue in respect to this writing. The writing, which was admittedly signed by Lawrence, showed on its face that he received the \$25 in full settlement of his claim for damages, and the burden was on him to overcome the effect of this writing, which he attempted to do by the evidence of himself, Ringold and Edwards. If, as said by the court in the instruction, the writing was only intended to be a settlement of a claim against Ringold, then it was not a settlement of his claim for damages, and, consequently, not a bar to a recovery against the city. On the other hand, unless they believed that it was only intended to settle his claim for damages as far as Ringold was concerned, it was a bar to any recovery against the city.

Some suggestion is made as to misconduct of counsel for the city in his argument to the jury, but we do not find in the bill of exceptions that any objection was made to the argument of counsel.

It is also said that the court erred in failing to instruct the jury upon the subject of Lawrence's right to recover damages for the impairment of his power to earn money, but, as the jury did not find for him at all, it is not apparent how this omission was prejudicial.

The judgment is affirmed.



**Shelton, By et al. v. Hunter, et al.**

(Decided February 4, 1915.)

**Appeal from Logan Circuit Court.**

**Automobiles—Frightening Animal on Street.**—It is not negligence for the driver of an automobile in a city to run it within three or four feet of a mule hitched to a buggy standing on the side of the street, unless it should appear that the mule gave evidence of fright on the approach of the automobile and that this was discovered or in the exercise of ordinary care should have been discovered by the driver. The nearness to which a machine is run to an animal does not constitute negligence unless it is purposely done to cause fright or unless the driver before going near discovers, or should in the exercise of ordinary care have discovered, that running the machine close to the animal would frighten it. The duty of the driver of an automobile is the same whether it is being run within three feet or thirty feet of an animal.

**BROWDER & BROWDER** for appellants.

**S. R. CREWDSON** and **SELDEN Y. TRIMBLE** for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

This suit was brought by the appellant to recover damages for injuries sustained, as he alleged, through the negligent operation of an automobile. On a trial of the case there was a verdict, by direction of the court, for appellee, and the only question is the correctness of this ruling.

We think the lower court correctly ruled the case for two reasons, but as one of them will serve every useful purpose, the other need not be noticed.

The appellant was seated in a buggy, to which there was hitched a mule, on the side of the street in the city of Russellville. The mule's head was some three or four feet from a concrete foot crossing that was four or five feet wide. The automobile, which was driven by a young lady, came up the street facing the mule's head. There is some evidence that the automobile as it came up the street some distance from the mule was being run from one side of the street to the other. Whether this was due to inexperience on the part of the young lady at the wheel or was purposely done, does not appear from the record, and there is no evidence tending to show that she was either incompetent or reckless.

There is also evidence that when the automobile came to the foot crossing, which seems to have been elevated a few inches above the grade of the street, and when in about ten feet of the mule's head and while running about eight or nine miles an hour, it was turned in the direction of the mule and passed within three or four feet of him, although it might have been run some ten or fifteen feet from him.

It further appears that about the time the automobile came upon the foot crossing the mule manifested some uneasiness by raising his ears, but he did not show other symptoms of fright or attempt to run until the automobile had gotten even with or passed him. About the time the automobile got even with the mule he lunged a few times and started to run. When he started to run or possibly when he commenced lunging the appellant, Norman Shelton, a boy about thirteen years old, jumped out of the buggy. When he jumped his foot or body in some way caught in the lines, and he was dragged by the mule some distance over the street, receiving injuries that were severe and permanent.

Letting Norman tell the story of the accident in his own way, he said: "I think I was sitting there talking to somebody up the street behind me. I am not sure; and I did not hear the auto coming. It did not blow any horn that I remember of, and the first thing I saw of it was at Cook's crossing. It bounced over the crossing and swerved over into the mule, and the mule jumped and I jumped out and throwed out my foot and I got in the lines, and I tried to get that out and got the other one in, and the mule run. Q. Where was the automobile when it suddenly turned toward the mule? A. Just as it crossed the crossing. Q. Can you recollect enough to tell the jury about how close to your mule the machine got before the mule jumped? A. I reckon about ten feet. Q. What frightened the mule? A. The car coming into it and like all autos are going up grade, it was chugging away. Q. Making a noise? A. Yes sir. Q. Do you think running towards the mule frightened him and also making the noise? A. Yes sir. Q. Did it run into the mule. A. No sir; come in about ten feet of the mule; maybe a little closer. Q. It did not get out of the street very much then; the track that was traveled? A. No sir; I don't reckon it did; I don't remember very well. Q. You say the mule did not run off until the machine passed him? A. Right even with it or a little above it, he commenced get-

ting frightened at it. Q. The machine had really got past the mule before the mule run? A. Yes, sir. Q. And the machine was about opposite the mule before he showed any sign of distress, was it not? A. Of course the mule saw it before I did and he raised up his ears to it, and when it got over the crossing the mule sorter jumped to one side. Q. Jumped to one side as the machine came over the crossing? Yes sir. Q. Which side did he jump to? A. Sorter back towards the pavement. Q. And the machine had come up at that time? A. Yes sir. Q. And run on? A. Yes sir."

Mrs. Robertson, who was nearby, testified:

"Q. Did that mule this boy was driving take fright at that machine? A. When the machine got opposite the mule the mule gave a lunge and got started. Q. What did the boy do? A. He fell out of the buggy. Q. You say the mule did not start until the automobile got opposite him? A. Yes sir. Q. The machine was coming straight up the street at that time. A. Yes sir. Q. How far was it away from the mule? A. I can't tell you about that. It was going along about the middle of the street. Q. And opposite the mule before he did anything? A. Yes sir; about opposite the mule when he started."

Marion Johnson, another witness, said that the mule did not start to run until the machine got even with him; that he supposed the automobile frightened the mule, as it ran within three or four feet of him.

E. White said: "I was standing there and the auto come up over the crossing, and it kinder made a pretty good spring there, and the mule kinder scared and she sorter turned and looked the way she was running; she was running right toward the mule, and then she turned and went around the mule and the mule went down the street. I can't tell you how close he got to the mule before she turned but tolerable close. Q. You say when the machine come across the crossing it gave a bounce over the crossing? A. Yes sir. Q. And the mule frightened at that time? A. Yes sir, and started to run. Q. You didn't see the machine until it got on the crossing? A. When it went by the crossing it bounced up and I looked and the mule was scared. The mule sorter turned when she went over the crossing. Q. Up to that time the mule had not done a single thing? A. I had not seen him if he had."

E. L. McIntosh said he saw the automobile first at the crossing; that as the automobile came up the mule

jumped back, and about the time the automobile passed the mule he ran off.

It does not seem to us that this evidence was sufficient to make out a case of negligence against the operator of the machine. The horn was not sounded as the machine approached the mule, nor was there any reason why it should have been. The speed of the automobile was not excessive, nor was the conduct of the mule, until the automobile had passed him, sufficient to put a person of ordinary prudence on notice that he was frightened or likely to run off. It is true that the mule raised his ears and gave some evidence of fright when the automobile was within a few feet of him, but it was then too late to stop the machine or take any steps towards preventing the further fright of the mule other than to go ahead, and this the driver did.

It is urged by counsel for appellant that the evidence showing that as the automobile passed the crossing it turned towards the mule, passing within a few feet of him, was sufficient to take the case to the jury, as the action of the driver in letting the automobile turn toward the mule was an act of negligence and the thing that caused the mule to take fright and run off. There would be much force in this if this turn was made to frighten the mule or if the mule before this had manifested any signs of fright, but he did not, nor did the automobile touch the mule or run closer than three or four feet, or, as some of the witnesses say, eight or ten feet from him, and we do not think it can be said to be negligence to run an automobile as this one was being run within three or four feet of an animal standing on a street. It is a common, everyday occurrence for automobiles to pass within two or three feet of horses and mules standing and being driven on streets and roads, and we know of no rule of the road or provision of the automobile law that makes it negligence to do this, in the absence of evidence tending to show a purpose to frighten or that the approach of the automobile frightened the animal to such an extent as to make it the duty of the driver of the machine, in the exercise of ordinary care, to take such action as might be necessary to prevent collision or further fright. The duty of the driver of an automobile is the same whether it is being run within three feet or within thirty feet of an animal. The nearness with which a machine is run to an animal does not constitute negligence unless it is done purposely to cause fright or unless the driver, before going near,

discovers, or should in the exercise of ordinary care have discovered, that running the machine close to the animal would frighten it. And neither of these things appeared in the evidence.

Wherefore, the judgment is affirmed.

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## **Illinois Central Railroad Company v. Rogers & Thomas.**

(Decided February 4, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, No. 3).

**Carriers—Carriers of Live Stock—Loading and Unloading.**—Where the shipper himself attends to the loading of a car of live stock, and does so improperly and loss or injury results from such improper loading, the carrier is not held liable as an insurer although an inspection would have disclosed such improper loading.

TRABUE, DOOLAN & COX, S. LYMAN BARBER and R. V. FLETCHER for appellant.

THOMAS C. MAPOTHER for appellee.

OPINION OF THE COURT BY JUDGE HANNAH—Reversing.

On February 4, 1914, in the Jefferson Circuit Court, Rogers & Thomas obtained a verdict and judgment against the Illinois Central Railroad Company in the sum of \$219.10 for damages to a shipment of livestock which was delivered by them to and accepted by the railroad company at Leitchfield on April 29, 1913, for transportation to Louisville.

It was shown in evidence by the plaintiffs that they loaded a mixed car of live stock at Leitchfield in three separate compartments; in one end of the car, some calves and sheep; in the other end, eight head of cattle; and in the middle, and separated by partitions at either end, a lot of hogs. It was further shown that on arrival of the car at Louisville two hogs were dead, one cow crippled and three or four others somewhat injured.

The duty of doing the loading was assumed by the shippers; they loaded the car themselves without assistance of any of the carrier's agents; and the agent at Leitchfield did not examine the car after it was loaded.

It was shown by the crew of the train which handled the car that at Kraft's, a station some twenty-five miles from Leitchfield, they discovered that there was something wrong in the car, and made an investigation, which disclosed that one hog was dead and another badly injured; one cow was down and three or four others injured; that about fifteen hogs were in the same compartment with the cattle; that they must have been loaded that way, as the partition between the cattle and the remainder of the hogs was intact. The trainmen knocked this partition out, thus allowing all the hogs to be in the same compartment with the cattle.

1. The court instructed the jury that it was the duty of the railroad agent at Leitchfield to see that the live stock was properly loaded before receiving it for shipment; and that if they believed from the evidence that the railroad company accepted the shipment not properly loaded, but in good condition, and that the live stock was injured or damaged or depreciated in value on delivery at destination, they should find for the plaintiff, unless they should further believe from the evidence that such injury or depreciation was caused by the inherent nature or propensities of the animals, or was due to causes beyond defendant's control, in either of which latter events, they should find for defendant.

Appellant complains of this instruction for the reason that its effect is to impose liability upon the carrier for loss or injury due to improper loading of the car by the shipper.

Appellees insist that the instruction is proper, and cite in support of their contention the case of *L. H. & St. L. v. S. S. H. & C. Co.*, 157 Ky., 772. In that case, the court in illustrating what was meant by the rule that a carrier is not liable as an insurer for loss or injury caused by the act or fault of the shipper, said:

"For instance, under the fourth exception, if goods are insufficiently packed and this fact is not known to the carrier or discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence."

But, in stating the illustration quoted, the court had in mind only those instances where the goods are delivered in crates or packages to the carrier at its warehouse, there to be loaded into cars by the carrier, and not by the shipper. In such cases the weight of author-

ity is that if the improper condition is not known to the carrier or discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence. 6 Cyc., 380; 4 R. C. L. Carriers, Sec. 203; 18 Ann. Cas., 234, note; 29 L. R. A. (N. S.), 1214, note. But where the improper condition of the goods is known to the carrier or discoverable in the exercise of reasonable care in the ordinary handling and loading of the goods, and they are accepted by the carrier without qualification or dissent in respect of such condition, the carrier must handle the shipment with reference to such defective condition, and is liable for loss or injury thereto if negligent in respect thereof. *The David & Caroline*, 5 Blatch (U. S.), 266; *Union Express Co.*, 26 Ohio St., 595.

It is well settled by the almost unanimous authorities that where the carrier furnishes a car to the shipper for the purpose of shipping live stock therein, and the latter loads the live stock himself, and in doing so he overcrowds the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, being caused by his own act, or by his own act in conjunction with the inherent nature, propensities and qualities of the animals themselves, the carrier not being liable for loss or injury due to either or both of such causes. *Hutchinson on Carriers*, Sec. 333; *For-dyce v. Flynn*, 56 Ark., 424, 19 S. W., 961; *Ficklin v. Wabash R. Co.*, 115 Mo. App., 633, 92 S. W., 347 (overcrowded sheep); *F. W. & D. C. R. Co. v. Word*, 32 S. W., 14; *Squire v. N. Y. C. R. Co.*, 98 Mass., 239, 93 A. D., 162 (hogs); *Texas R. Co. v. Klepper*, 24 S. W., 567 (overcrowded horses); *Miltimore v. C. & N. W.*, 37 Wis., 190 (wagon not securely loaded on car); *Ross v. Troy R. Co.*, 49 Vt., 364, 24 A. R., 144 (machinery insecurely loaded on car); *Penna. R. Co. v. Kenwood Bridge Co.*, 170 Ill., 645, 49 N. E., 215 (bridge material loaded by shipper); *O. & M. R. Co. v. Dunbar*, 20 Ill., 623, 71 A. D., 291; *Rixford v. Smith*, 52 N. H., 355, 13 A. R., 42; *Miss. Ry. Co. v. Belcher*, 41 S. W., 706; *Texas R. Co. v. Edins*, 83 S. W., 253; see 6 Cyc., 381; 4 R. C. L., Sec. 203, Carriers.

There are a few respectable authorities holding the contrary view. In *Kinnick Bros. v. C. R. I. & P. R. Co.*, 69 Iowa, 665, 29 N. W., 772, a shipper loaded a car of hogs, and they were injured because of being over-

crowded in the car. The carrier's agent, however, had closed the door of the car, and the court held that as there was nothing to prevent his observing the manner in which the hogs were loaded, the carrier was not relieved from the consequences of the shipper's act or fault in overcrowding the animals in the car.

In *Duncan v. Great Northern R. Co.*, 17 N. D., 610, 118 N. W., 826, 19 L. R. A. (N. S.), 952, a car was loaded by a shipper with flax. The shipper closed the inside doors, and the carrier's agent closed the outside doors. While the car was en route some of the flax escaped by reason of the inside door becoming unfastened. The court said that the devices for fastening the inside doors were open to the inspection of the carrier's agent when he closed the outside doors, and were where he could not avoid seeing them if he looked at all, or even made the slightest effort to ascertain whether they were properly fastened; and upon that ground held the carrier not relieved by the act of the shipper in neglecting to fasten securely the inside doors of the car.

The *Duncan* case rests upon the *Kinnick* case, *supra*, and the case of *McCarty v. L. & N.*, 102 Ala., 193, 14 So., 370, 48 A. S. R., 29.

In the *McCarty* case the court held that if the improper loading of the cars was apparent, that is, was a fact which addressed itself to the ordinary observation of the carrier's servants, the carrier is not relieved upon the ground that the loss or injury was due to the act or fault of the shipper.

The *Duncan* case also cites *Union Exp. Co. v. Graham*, 26 Ohio St., 595; but a fair interpretation of the opinion therein is that if the carrier receives for shipment property insufficiently packed when he might, in the exercise of reasonable care, have discovered such insufficiency, the carrier is still liable for loss or injury thereto due to his negligence.

In *Gulf W. T. & P. R. Co. v. Wittnebert*, 101 Tex., 368, 108 S. W., 150, 130 A. S. R., 858, 16 Ann. Cas., 1153, 14 L. R. A. (N. S.), 1227, the court said that it had found no dissent from the rule that when a consignor loads freight upon a car, the carrier which receives the car as loaded is not liable for damages which arise from a defect in the loading, but, after reviewing a number of cases, the court said:



“The authorities cited and from which we have made the quotations above establish the proposition that it is not the duty of a railroad company which receives from the owner or from another railroad a loaded car to make an inspection of the manner of the loading when the defect cannot be discovered by an external examination.”

However, as has been seen from the authorities cited, the great weight of authority supports the proposition that where the shipper loads the car himself, the carrier is not liable for loss or injury arising from such defective manner of loading, whether the same be discoverable or not, if not actually discovered by the carrier. The carrier has a right to assume that the shipper has loaded the car in proper manner; and it does not lie in the mouth of a shipper whose act or fault in respect to the manner in which he loaded the car has resulted in loss or injury to his property, to say to the carrier that it might have discovered such improper loading by an inspection. The shipper may not thus derive advantage from his own wrong.

For the error in the instruction noted, the appellant is entitled to a new trial, and the judgment of the lower court is, therefore, reversed.

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### **Armstrong v. Illinois Central Railroad Company.**

(Decided February 4, 1915.)

#### **Appeal from Ballard Circuit Court.**

1. **Carriers—Carriers of Live Stock—Limitation of Liability—Validity of Stipulation as to Time When Claim for Loss or Damage Must Be Presented.**—A stipulation in a contract for the interstate carriage of live stock, requiring claim for loss or damage to be presented within ten days after the stock is unloaded from the car, is valid; and no action may be maintained by a shipper who has failed to conform to such stipulation.
2. **Courts—Jurisdictional Amount.**—Where plaintiff sued for \$720 for damages to a shipment of live stock and \$25.80 for overcharge in freight rate thereon, and defendant presented a valid defense to the claim for damage to the livestock by answer, demurrer to which was overruled by the court, plaintiff declining to plead further, so that there remained in controversy only \$25.80, the circuit court was without jurisdiction to entertain the proceeding further, and properly dismissed the entire petition.

HENDRICK & NICHOLS for appellant.

GUS THOMAS, BLEWETT LEE, TRABUE, DOOLAN & COX and CORBETT & WHITE for appellee.

OPINION OF THE COURT BY JUDGE HANNAH—Affirming.

On January 29, 1913, M. W. Armstrong delivered to the Illinois Central Railroad Company at Paducah a shipment of horses and mules for transportation to Marks, Mississippi.

On May 3, 1913, Armstrong sued the railroad company in the Ballard Circuit Court for \$720.00 as damages for injuries sustained by the live stock in transit, and \$25.80 as overcharge in freight rate.

The contract of carriage contained a stipulation that no claim for loss or damage to the live stock should be valid unless claim therefor was presented to the carrier within ten days from the time the stock was removed from the car.

The railroad company answered pleading this stipulation and the failure of the shipper to conform thereto. The plaintiff filed a demurrer to the second paragraph of the answer, in which paragraph the plea mentioned was set up, and the court overruled the demurrer.

The plaintiff thereupon declined to plead further, and the court dismissed the petition. From that judgment the plaintiff appeals.

Upon the demurrer the averments of the second paragraph of the answer as to the terms of the contract and the failure of the plaintiff to give the notice mentioned within the specified period are taken as true.

The transaction here involved being interstate commerce, the validity of the stipulation in question is one to be determined under the common law as declared by the United States Supreme Court. This has been the rule since Congress, by the enactment of the Carmack Amendment to the Hepburn Act, assumed to regulate the subject of the liability of an interstate carrier for the loss of or damage to an interstate shipment.

And the Federal rule is that such stipulations are valid. *Missouri, Kansas & Texas Railway Company v. Harriman*, 227 U. S., 657, 57 L. Ed., 690.

Controlled by the *Harriman* case, this court, in *Howard & Callahan v. Illinois Central Railroad Com-*

pany, 161 Ky., 783, decided December 18, 1914, held valid a stipulation identical with that here involved.

The trial court, therefore, properly overruled the demurrer to the second paragraph of the answer.

2. As to the item of \$25.80 for alleged overcharge in freight rate on the shipment, the circuit court had not original jurisdiction to entertain an action for that amount only; hence, when plaintiff declined to plead further in respect of the item of \$720 for injuries to the live stock, the petition no longer presented a cause of action thereon; and, as there remained in controversy only \$25.80, it was proper to dismiss the entire petition.

Judgment affirmed.

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### **Apseloff Brothers v. Hyman, et al.**

(Decided February 4, 1915.)

Appeal from Campbell Circuit Court.

**Mechanics' Liens—Defective Construction—Evidence.**—In an action to enforce a mechanics' lien, evidence examined, and held that the work for which plaintiffs claimed a lien was not properly done, and they were therefore not entitled to a lien.

HUBBARD SCHWARTZ for appellants.

JAS. C. WRIGHT for appellees.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.**

This is an action by appellants, Apseloff Brothers, to enforce a mechanic's lien on certain property belonging to appellee, Lizzie Hyman. The case was referred to the master commissioner to hear evidence and report on the claim. He filed a report rejecting the claim. Exceptions to his report were overruled, and judgment entered approving his finding. From that judgment this appeal is prosecuted.

The facts are these:

Appellee, Lizzie Hyman, contracted with Kuller & Golden, general contractors, to build a house on a lot which she owned. Kuller & Golden sublet the brick work to appellants, who, upon completion of the first story, were to be paid the sum of \$200, and certain payments thereafter as the work progressed. Appellants completed the first story, and because appellee declined to pay them

the sum of \$200, which they claimed that she had agreed to pay, refused to go on with the work. Kuller & Golden then tore down the work which appellants had constructed, and reconstructed the building in part, when they also abandoned their contract.

Appellants are asking a lien for the work which was torn down. They and their witnesses testify that the first story was built according to contract and in a workman-like manner. The evidence for appellee is that the construction was faulty and did not come up to the requirements of the specifications. We deem it unnecessary to state the evidence at length. Though the evidence tends to show that the appellee promised to pay appellants the sum of \$200, the evidence that the first story was properly constructed is by no means satisfactory. Perhaps the most persuasive evidence concerning the character of the work is the fact that Kuller & Golden, the general contractors, who were responsible for the proper construction of the building, tore down the work which appellants had constructed, and replaced it at their own expense. Both the commissioners and the chancellor found that the work for which appellants claim a lien was not properly done, and upon a consideration of all the evidence, we are unable to say that they erred in their conclusion. Judgment affirmed.

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### Woodford v. Woodford, et al.

(Decided February 4, 1915.)

#### Appeal from Clark Circuit Court.

1. **Husband and Wife—Divorce.**—The wife's rights under a trust deed executed to a third party for the use and benefit of the husband and family, terminates with divorce, and it is the duty of the court to modify or set aside a former order granting her a portion of the rents and profits arising therefrom, where the court reserved in such order the right to change or modify the same.
2. **Deeds—Trusts.**—Where a trust deed reads, "for the use and benefit of my son, and his family," the wife and children were entitled to a portion of the benefits stipulated in the deed so long as they remained members of his family.

J. SMITH HAYS, JR., ELMER D. HAYS and J. SMITH HAYS  
for appellant.

PENDLETON, BUSH & BUSH for appellee.

## OPINION OF THE COURT BY JUDGE NUNN—Reversing.

Two questions are raised on this appeal. First, what interest did the appellee take as the wife of L. A. Woodford under a deed of trust? Second, to what extent are her rights affected by a subsequent decree of divorce?

The trust deed was executed in October, 1882, and is as follows:

“Know All Men by These Presents, That I, S. A. B. Woodford, for and in consideration of the love and affection I bear my son, Lewis A. Woodford, hereby bargain, sell and convey to my son-in-law, Dr. Francis Jones, in trust for my son, Lewis A. Woodford, the following described real estate, to-wit: (Here follows description of land.)

“The above land is hereby conveyed to Dr. Francis Jones in trust for my son, Lewis A. Woodford, the title to be in said Jones, for the use and benefit of my son, Lewis A. Woodford, and his family; my said son and his wife and their children to have possession, use and control of same in any manner he or they may wish, but the rents, profits, crops or anything arising therefrom are not to be subject to or liable for any debts or obligation he may contract for or be liable to, and at my son's death, the title is to pass direct to his children, and if he die without children, then the same is to revert to my heirs. Possession is given as of this date, together with all the privileges and appurtenances to the same belonging.

“To Have and To Hold the same to the said Dr. Francis Jones in trust as above set out, hereby covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free and unencumbered, and that will warrant and defend same against all legal claims whatsoever.”

Under this trust deed Lewis A. Woodford and family took possession of the land and resided thereon. When the first controversy arose the family consisted of the husband, wife, and six children. For reasons which the record does not set forth Mr. and Mrs. Woodford separated. He with three children remained on the farm, and Mrs. Woodford with three children took up a residence elsewhere. In March, 1907, Mrs. Woodford, by petition in equity and relying upon the provisions of the trust deed, sued for herself and as next friend for

the three infant children residing with her, viz., Lelia Woodford, Stella Woodford and Bathurst Woodford. She sought to have a new trustee appointed in lieu of Dr. Jones, who had died some years prior, and to require her husband, L. A. Woodford, to pay to the new trustee, for the benefit of herself and the three children, one-half of the rents and profits, or else a judgment awarding them the use and occupation of one-half of the land. It was alleged that its rental value was \$800. L. A. Woodford filed a written statement consenting that Frank Battaille be appointed trustee, and agreeing also that the net rental value of the land was \$800, one-half of which should be paid to the plaintiffs, or to the new trustee for their benefit. Upon this statement the court entered judgment directing that the sum of \$400 be paid to the trustee by L. A. Woodford for the benefit of Mrs. Woodford and the three children living with her. These payments to be made "on the first day of March each year thereafter until changed or modified by mutual consent of the parties hereto, or by order of this court." These payments were made as stipulated in the judgment until March 1st, 1912. About that time Mrs. Woodford sued for divorce in the Clark Circuit Court. The record does not show, and for purposes of this case it is immaterial, what were the grounds of divorce. At the September term, 1912, Mrs. Woodford was granted a divorce from the bonds of matrimony, and the judgment contained a formal statement restoring to each any property acquired from the other because of the marriage. It does not appear that any attempt was made to recover alimony, nor was any property described or directly involved in the divorce proceeding.

Bathurst Woodford took up a residence about this time with his father; Stella Woodford had died in infancy and without issue; and it is conceded by briefs, and the judgment of the lower court so recites, that Lelia Woodford, the third child who lived with Mrs. Woodford, is now of age and married to one Young. Believing that the divorce judgment terminated the rights of Mrs. Woodford in the trust estate, L. A. Woodford failed to make further payment. That is, he ignored the judgment entered in the proceeding instituted in 1907, whereby it was ordered that \$400 be paid for the benefit of herself and the three children residing with her.

In April, 1913, Mrs. Woodford gave notice, and on her motion the first action was redocketed. It does not satisfactorily appear that Lelia Woodford (Young) was a party to the notice. The answer which L. A. Woodford filed on the motion to redocket is a separate answer to the petition of Mrs. Woodford only. The answer sets up the death of Stella Woodford; the return to his home of Bathurst Woodford; the proceedings and judgment of divorce, and a denial of the right of Mrs. Woodford to possession or control of any of the land mentioned in the trust deed, or any rents or profits therefrom. It is averred that if she ever had any rights under the trust deed, they were such as accrued to her as a member of his family, and that when she ceased to be his wife, she was no longer a member of his family, and that he was under no further obligation to her by reason of the trust deed or otherwise. The court sustained a demurrer to this answer. L. A. Woodford refused to plead further, and the court adjudged that he continue to pay \$100 each to Mrs. Woodford and Mrs. Young annually thereafter, with right in them to collect the same by rule or other process. L. A. Woodford appeals from this judgment and raises the questions already noted. He insists that the court should have carried the demurrer back to and sustained it to Mrs. Woodford's notice and petition.

Appellant argues that by the judgment of divorce all legal obligation of support was extinguished and no right to alimony longer existed. He says that as she did not ask for alimony and none was allowed in the divorce proceeding, then she is deemed to have waived her right thereto, because, under the law, allowance of alimony can only be made at the time or before judgment of divorce. *Campbell v. Campbell*, 115 Ky., 156.

Appellee does not controvert the rule that when a divorce is granted the wife cannot by a subsequent action secure alimony, but the application of that principle to this case is denied on the ground that her proceeding is not one for alimony. It is argued in her behalf that she was one of the parties for whose benefit the deed was executed and the trust created, and that she and her children took a present vested interest therein, and that by virtue of the proceeding in 1907 such interest was conceded by appellant, and established by order of court, and that the rights of the parties to

this property were then adjudicated, and are not affected by the subsequent divorce judgment, or by the formal order of property restitution made therein. In support of that position her counsel cite the cases of *Johnson v. Johnson*, 93 Ky., 391; *Pope v. Pope*, 148 Ky., 30; *Flood v. Flood*, 68 Ky., 167; *William v. Gooch*, 3 Met., 486; *Bennett v. Bennett*, 95 Ky., 545. These cases lay down the doctrine that Section 425 of the Code requiring every divorce judgment to contain an order of property restitution does not apply to property theretofore given, conveyed, or adjudged by final order, to the wife by a husband in settlement of her property rights. Such property is not treated as having been obtained in the meaning of the code by virtue of the marriage, but rather in consideration and settlement of a valuable property right that the wife might have enforced against the husband. The principle is well stated in the *Johnson case*:

"We are of the opinion that the property theretofore adjudged to the wife in the judgment of 1885 is unaffected by the general and formal order of restitution in the judgment of 1891. The law (Section 425, Civil Code) provides that every judgment for a divorce from the bonds of matrimony shall contain such an order of restitution, but the order is merely a formal one and is not intended to settle any controversy concerning the title of property, certainly not to set aside a former final judgment of the courts between the divorced parties. That judgment finally disposed of the property in controversy before the commencement of the action for divorce brought by the husband in 1891. The wife did not obtain the property in consideration of or by reason of the marriage."

But there is this difficulty in applying that principle here—the judgment in the 1907 action with reference to rents and profits was not a final disposition thereof, nor a final order as to the trust estate. The judgment expressly reserved to the court the right to change or modify it, and we think it the undoubted duty of the court to modify or even terminate the payments if the domestic relations of the parties have so changed as to make a performance of the former order inconsistent with the intent and purpose of the donor, as expressed in the trust deed.



So the question comes down to the rights of the parties under that deed. It is conceded that she has no right to demand alimony, now that the divorce decree is entered, and we are of opinion that she did not gain any fixed or permanent right under the 1907 judgment. The wife and children are not parties to the deed. Their names do not appear in the body or caption of it. The consideration is "love and affection I bear for my son, Lewis A. Woodford." The conveyance is to Dr. Jones, his son-in-law, "in trust for my son, Lewis A. Woodford." The purpose of the trust is, "for the use and benefit of my son, Lewis A. Woodford, and his family." It is true the deed then stipulates "my son and wife and their children are to have the possession, use and control of the place, and at the son's death the title is to pass to his children." But the manifest purpose of the donor was to provide for his son, and the provision was induced by the love and affection he bore for him. Out of regard for the son, he desired those to be benefited by the conveyance whose legal and moral duty it was for the son to support, and he gave expression to that desire in the deed. The son owed the duty, legally and morally, of support to the members of his family, and the family consisted of his wife and children. So long as that relation existed they had a right to look to him for support and they were entitled to the benefits named in the trust deed. In accomplishing the purpose of the donor the judgment in the 1907 proceeding met all the requirements, and was manifestly just and proper, because Mrs. Woodford was then his wife and the three infant children who were residing with her were his children, and he was in law bound to support them. As they reached maturity and the daughter married the legal obligation ceased. It also ceased as to Mrs. Woodford when the marriage relation was dissolved.

The case of *Webb v. Holmes*, 3 B. Mon., 404, was a suit for partition brought by the children against their mother, Mrs. Thomas. They claimed title under a deed executed by her parents conveying the land "to her, her children forever," and "for the entire benefit of her and his (her) children forever." The court denied the right of recovery or partition in the children during the lifetime of their mother, and in construing the deed said:

"This is a deed *inter partes*, in which Crist and wife are named parties on the one side, and Sarah Thomas and her husband on the other; the children are not parties, nor are they named as such in the caption of the deed, which, by the designation of the parties, is intended to confine the deed to those who are named, in exclusion of all others as contracting parties. And, as a stranger, who is not party to a deed, can derive no legal interest under it, or maintain covenant on it, so it is well established that those who are not parties to a deed can take no present interest under it; but those who are not parties may take by way of remainder. (Vo. L. 231, a; 3 M. & S., and the notes seq. Principal and Agent, 243.) So, to give to the deed operation at all, as to the children, they must be construed to take in remainder only, as they cannot take a present joint interest with the mother. And surely such construction should be given to the deed as to give some beneficial interest to the children, as they were clearly intended to be provided for. By giving to them an estate in remainder in fee, to take effect after the life estate of their mother, they all may be provided for, not only those who were born before, but those who were born after the date of the deed, for in that case there is a freehold to support the remainder until all the children are born. And it may be fairly presumed that it was as much the object of the donor to provide for after born children as those that were born before the date of the deed."

This rule is followed in the case of *Foster v. Shrieve*, 6 Bush, 519; *Davis v. Hardman*, 80 Ky., 672.

We are of the opinion that during the lifetime of L. A. Woodford his adult children cannot maintain a claim for the land or any part of it, and, except possibly Mrs. Young, it does not appear that they are setting up a claim. As for the appellee, Mrs. Woodford, she is no longer his wife and is not a member of his family, and, under our construction of the deed, she cannot claim any right or benefit under it. She is entitled to the payments, *pro rata*, up to the divorce, but no further.

The lower court should have carried the demurrer over and sustained it as to the petition and notice of Mrs. Woodford, and the judgment is reversed for proceedings in accordance herewith.

**Commonwealth v. Hirsch Brothers & Company.**

(Decided February 4, 1915.)

## Appeal from Mercer Circuit Court.

1. **Intoxicating Liquors—Jurisdiction.**—Where one is charged with delivering intoxicating liquors in violation of Chapter 7, Acts 1914, held, that the delivery took place, and the offense was committed, in the county in which the same was delivered to the carrier, and that the courts in the county to which the same was consigned did not have jurisdiction.
2. **Criminal Law—Jurisdiction.**—It is fundamental that a crime is punishable only in the jurisdiction where it was committed.

R. W. KEENON and C. H. MORRIS for appellant.

E. H. GAITHER and KOHN, BINGHAM, SLOSS &amp; SPINDLE for appellees.

## OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Appellee, Hirsch Brothers & Company, is a corporation with its principal place of business in Louisville. Under a warrant from Mercer county, it was charged with an offense alleged to have been committed in Mercer county, by delivering intoxicating liquor at Louisville, for shipment to Harrodsburg, in Mercer county, where the sale of intoxicating liquor is prohibited by law, and when the package containing the liquor "did not contain the name and address of the consignor, nor state that such liquor was for personal and family use of the consignee."

The offense is charged under the provisions of Chapter 7 of Session Acts of 1914. There is no controversy as to the facts; the case was submitted to the lower court under an agreed state of facts. It thus appears that Hirsch Brothers & Company did deliver a package containing intoxicating liquor to the Southern Railroad Company at Louisville, consigned to one Board at Harrodsburg, where its sale is prohibited by law; that Board is not a distiller, brewer or wholesale liquor dealer; that the package was not labeled as required by the 1914 act.

On this statement of facts, the appellee was adjudged not guilty, and the Commonwealth appeals.

While we do not mean to say that appellee did not violate the act of 1914, it is evident that it is not guilty of any offense in Mercer county. Such consign-

ment or delivery of the liquor as it made was in Jefferson county, and hence the Mercer courts had no jurisdiction. The circuit court so ruled, and we think properly. The Southern Railroad Company in carrying the liquor to Mercer county acted as the agent of the consignee, Board. It follows that the delivery made by Hirsch Brothers took place in Jefferson county. Hirsch Brothers parted with the title, that is, sold and delivered the liquor when possession was surrendered to the carrier in Louisville. This principle of law is so well settled, and has been so uniformly adhered to by this and courts everywhere that it cannot be considered an open question. In *Commonwealth v. Gast, Crofts & Co.*, 143 Ky., 674, this court said:

“Appellee corporation did not make any sale or delivery of an intoxicating beverage, to-wit: cider to Davis in a local option district. The order was sent by Davis from Manchester to their place of business in Jefferson county, and the corporation parted with the property and the possession when it delivered the order to the railroad, a common carrier, in Jefferson county. *McDermott v. Commonwealth*, 29 Ky. L. R., 750 and 752, and *Commonwealth v. Price & Lucas Cider and Vinegar Co.*, 31 Ky. Law Rep., 1356.”

To the same effect is the ruling of this court in *Parker v. Commonwealth*, 147 Ky., 715; *Whitmeier v. Commonwealth*, 140 Ky., 734; *Weidemann Brewing Co. v. Commonwealth*, 123 Ky., 556; *Josselson v. Commonwealth*, 154 Ky., 795; *Doores v. Commonwealth*, 121 Ky., 226; *James v. Commonwealth*, 102 Ky., 108; *Commonwealth v. Lexington Brewing Co.*, 147 Ky., 687; *Kahn's Sons v. Commonwealth*, 143 Ky., 297; *Josselson v. Commonwealth*, 158 Ky., 787; *Josselson v. Commonwealth*, 159 Ky., 468; *Rist v. Commonwealth*, 159 Ky., 753.

It is argued for the Commonwealth that Board, the consignee, ought not to be prosecuted for receiving the liquor because he was ignorant of the alcoholic contents, and was deceived by Hirsch Brothers in purchasing it, and that the carrier ought not to be prosecuted because Hirsch Brothers failed to label it as required by law, and it was, therefore, ignorant of the contents and intended no violation of the law. It is said that unless Hirsch Brothers be convicted the guilty party will go free. This does not necessarily follow. Under the agreed statement of facts, the offense was committed in Jefferson county and we are unwilling to say that the courts and juries of Jefferson county will fail in their duty. The

legislature in penalizing the various acts with reference to the shipment of liquor into dry territory did not change or attempt to change the venue of prosecutions. It is fundamental that a crime is punishable only in the jurisdiction where it is committed.

The judgment of the lower court is affirmed.

## Ewing v. Citizens National Bank.

(Decided February 5, 1915.)

Appeal from Marion Circuit Court.

1. Banks—Checks—Definition of—Negotiable Instruments Act.—A check is a bill of exchange drawn on a bank payable on demand. Except as otherwise declared therein, all the provisions of the "Negotiable Instruments Act" applicable to bills of exchange payable on demand, apply to a check.
2. Banks—Checks—What Giving of Does Not Affect—Certification of.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.
3. Banks—Checks—How Accepted—How Certified.—The acceptance of a check by the bank on which it is drawn, is the signification by the bank of its assent to the order of the drawer. The acceptance of the check, like its certification, in order to be binding on the bank, must be in writing and signed by it.

H. S. McELROY and S. A. RUSSELL for appellant.

W. H. SPRAGENS for appellee.

### OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment sustaining a general demurrer to the appellant, J. F. Ewing's petition as amended, and dismissing the action. The action was brought to recover of the appellee, Citizens National Bank, of Lebanon, Kentucky, \$291.40, the amount of a check drawn upon it by Charles Camden, payable to appellant.

The material facts alleged in the petition as constituting the appellant's cause of action are as follows: The check was given appellant by Camden, January 12, 1914, in payment of a debt he owed him. At that time Camden, though insolvent, had on deposit in the appellee bank to

his credit money sufficient in amount to pay the check. On that day appellant went, during banking hours, to the appellee bank, exhibited the check to its assistant teller and asked him if it was good. The assistant teller advised him that the check was good and that Camden then had on deposit in the bank money enough to pay it. Instead of then obtaining the money on the check appellant informed appellee's assistant teller that he did business with the Rolling Fork Bank at Bradfordville, a village near Lebanon, and asked him if appellee bank would pay the check if he deposited it to his account in the Rolling Fork Bank for collection. In reply appellee's assistant teller told appellant that the check would be paid by the appellee bank when presented to it by the Rolling Fork Bank. On the following day, January 13, 1914, appellant deposited the check in the Rolling Fork Bank and on January 14, 1914, that bank presented it to the appellee bank for payment. But the latter refused to pay it for the reason, as stated, that Camden then had no money in the bank, having already drawn out his entire deposit by check payable to an officer or officers thereof.

In sustaining the demurrer the circuit court held, that the alleged agreement of the appellee bank with appellant to pay the check given by Camden to the latter when presented by the Rolling Fork Bank, was not binding on appellee, because not in writing. This ruling was based on the court's construction of certain provisions of what is known as the "Negotiable Instruments Act" (Acts 1904, page 213), contained in Chapter 90b, Kentucky Statutes (Carroll's Ed., 1909). Section 3720b, sub-section 185, of the Statute provides:

"A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this act applicable to bills of exchange payable on demand apply to a check."

Subsection 189 provides:

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

Subsection 187 provides:

"Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance."

Certification of a check is usually made at the request of the drawer of the check, and the certification unconditionally imposes upon the bank making it the obligation

to pay the check when presented. The certification can of course only be given in writing. Acceptance of a check by the bank upon which it is drawn is customarily completed while the check is in the hands of the payee or holder, the acceptance being evidenced by a writing to that effect from the bank. "Acceptance" as defined by Section 3720b, subsection 190, "means an acceptance completed by delivery or notification." Appellant does not claim that the acceptance of the check given him by Camden resulted from a delivery of it to the appellee bank, but from its verbal assurance that it would be paid when later presented by the Rolling Fork Bank for that purpose.

Section 3720b, subsection 144, provides:

"Except as herein otherwise provided the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all endorsers are discharged."

The preceding subsection, 143, provides:

"Presentment for acceptance must be made: (1) Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) Where the bill expressly stipulates that it shall be presented for acceptance; or (3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable."

It is the contention of appellant that since a check is payable on demand it does not come within either of the three above provisions requiring presentment for acceptance, consequently the verbal assurance of appellee that it would be paid, was sufficient to fix its liability. Manifestly, this contention is unsound if the check is presented for acceptance instead of payment. The parties whose liability is to be affected by presentment for acceptance or failure to present for acceptance, as provided by subsection 143, are the drawers and endorsers and not the drawee, because no liability at all attaches to the drawee of a bill, or the bank upon which a check is drawn until the drawee or bank has accepted the bill, or certified or accepted the check. This is made plain by the provisions of subsection 144, *supra*. Obviously, the question here involved is controlled by subsection 189, *supra*, under the plain provisions of which the appellee bank could only

have been made liable under the circumstances here presented for the amount of the check in suit, by its acceptance or certification in writing of the check. That this is true, is made plain by subsection 132, Section 3720b, which provides:

"The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance *must be in writing and signed by the drawee*. It must not express that the drawee will perform his promise by any other means than the payment of money."

As by subsection 185, *supra*, "a check is a bill of exchange drawn on a bank payable on demand," and it was not alleged by the appellant in his petition that the appellee bank's acceptance of the check in question was made in writing and signed by it, the court below could not have done otherwise than sustain the demurrer to the petition.

The question here involved has never before been presented to this court for decision. It seems, however, to have been passed on by the Supreme Court of Colorado, in which State, as in most others of this country, the Negotiable Instruments Law is in force. In the case of *Van Buskirk v. State Bank of Rocky Ford*, 35 Col., 142, the court, after an elaborate discussion of the features of the act applicable in the instant case, said:

"Regardless of the common law rights of the parties under the facts of this case, we think there can be no doubt as to the correctness of appellant's leading contention that, under our negotiable instrument law, the drawee of a check is not liable to the holder unless and until he accepts or promises to pay the same, and such assent to his liability must be in writing."

The conclusion we have reached renders consideration of the question whether appellee's assistant teller had authority to accept for appellee the check, unnecessary, hence that question is not decided.

Judgment affirmed.

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### Daisey v. Wagner, et al.

(Decided February 5, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Third Division).

1. Master and Servant—When Master Not Liable For Injury to Servant.—A competent and experienced laborer employed to put



a tile roof on a house, the danger of doing which is obvious and therefore bound to be known to him, cannot, if injured by falling from the building while engaged in such work, recover damages of the master for such injury. Especially is this true where the injured employe is possessed of sufficient skill and experience to be placed in charge of the work.

2. Master and Servant—Doctrine of Safe Place—Where Not Applicable.—When the servant, by reason of his skill and experience, is put in charge of the work of putting on a roof, the rule that his master must use ordinary care to provide him a safe place to work has no application. As the danger of performing such work is open and obvious, the servant must protect himself against it, and he assumes such risks as are ordinarily incident to such work, and is charged with the duty of inspection and also left to his judgment as to the manner of doing the work.
3. Master and Servant.—Petition—Failure to State a Cause of Action—Demurrer to is Fatal.—Where, as in this case, the facts stated in the petition show that the injuries sustained by the employe were not caused by the negligence of the master, the latter's demurrer to the petition was properly sustained.

O'DOHERTY & YONTS and JOSEPH S. LAWTON for appellant.

FRED FORCHT for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, William D. Daisey, by the institution of this action in the Jefferson Circuit Court, common pleas branch, third division, sought to recover of the appellees, E. H. Wagner and others, partners, doing business as J. F. Wagner's Sons, damages for injuries he sustained by falling from a building upon which he and other employes of appellees were engaged in placing a tile roof. A demurrer was filed by appellees to the petition as amended, which was sustained by the circuit court, and appellant failing to plead further, the petition was dismissed at his cost. From the judgment manifesting these rulings he has appealed.

Appellees are engaged in the tinning and roofing business in the city of Louisville, and appellant, at the time of the accident resulting in his injuries, was employed by them as a general foreman in the work of roofing buildings. It appears that in the fall of 1912 appellees contracted with one Vissman, who was erecting a new residence in Louisville, to put a tile roof upon the building, and that appellant, as their foreman, was instructed by them to take charge of certain other of their employes, over whom he had control, and put the

tile roof upon the Vissman building, and while he and they were upon the building and performing the work of putting on the tile roof, he fell therefrom a distance of thirty feet to the ground, thereby sustaining the injuries complained of, which were of a painful and permanent character. The grounds relied on for the recovery sought are thus stated in the petition:

"Plaintiff states that the defendants, their agents and servants, by and through their gross negligence, failed to furnish the plaintiff with a reasonably safe place in which to do the work which he was required and directed to do under his employment, and that the said place was unsafe and dangerous in this—that the roof of said residence was very steep and the defendants, their agents and servants, failed to furnish and provide any gutters or hangers, or like appliances to the same, by means of which the plaintiff would have been enabled to use ladders upon said roof, while engaged in the work of placing and securing said tile in position on the sheeting of said roof. Plaintiff states that the defendants, their agents and servants, knew, or by the exercise of ordinary care, could have known of the unsafe and dangerous condition of said place, and, so knowing, ordered and directed the plaintiff to do the work of placing said tile upon said roof, and the plaintiff, in obedience to said order and direction of the defendants, their agents and servants, as aforesaid, did go upon said roof, and actually engaged in the work of placing the tile on said roof, and while so doing the plaintiff was, because and by reason of the unsafe and dangerous condition of said roof, as aforesaid, caused to slip and fall from said roof and to strike the ground and to sustain serious painful, and permanent injuries. \* \* \*

It will be observed that the single ground of negligence complained of above is that the appellant was required by appellees to work upon a steep roof which, by reason thereof and of the absence of gutters or hangers upon the roof, rendered it an unsafe place for the required work, and that these conditions caused his fall to the ground and consequent injuries. In the amended petition it was further averred:

"That before placing or setting the tile on said roof it was customary, and necessary at the time of the disaster to plaintiff herein, for the protection of the life

and limbs of the workmen placing or setting said tile on said roof, for the defendants and all similar concerns engaged in said tiling of roofs, in order to make said roof reasonably safe to work upon, to furnish and provide gutters or hangers on the lower edge of said roof, so that if a workman upon said roof, while engaged in setting said tile, happened to slip or fall, he would get caught or be able to catch himself on said hangers or gutters, and thereby be protected and prevented from falling to the ground. That it was the duty of the defendants to furnish such gutters or hangers on the roof mentioned herein, for the purposes mentioned above, but that defendants, their agents and servants, by and through their gross negligence, failed to furnish the plaintiff with a reasonably safe place or with reasonably safe appliances or any appliances whatsoever in which to do the work he was required and directed to do under his employment, and that the said place was dangerous and unsafe in this—that the roof on said residence was very steep and the defendants failed to furnish and provide any such gutters or hangers by means of which the plaintiff would have been protected and prevented from falling to the ground in the manner hereinafter set out.”

It is not averred in the petition or amendment thereto that there was any employe of appellees superior in authority to appellant in charge of the work on the roof, or charged with the duty of directing appellant how to do the work or of instructing him as to the manner in which it should be done. Neither is it alleged that the place on the roof from which he fell was one that he was ordered by a superior to take, or that there was any defect existing in the material used or the roof itself, or that any of the appliances used in performing the work were defective, or that, as a result thereof, appellant's injuries resulted. Reduced to the last analysis, the averments of the petition, as amended, simply convey the meaning that appellant slipped because of the steepness of the roof, and fell to the ground because there were no gutters or hangers upon the roof upon which he could have caught and prevented his fall after he had slipped. It is true the amended petition contains the averment that it was the duty of appellees to have furnished gutters or hangers upon the roof before requiring the work to be performed thereon; but

as appellant was an experienced workman in roofing, and by reason thereof was acting as appellees' foreman, and was, in fact, in charge of the work of putting on the roof, he must have known, and did know, that there were no gutters or hangers upon the roof, and also of the steepness of the roof, and that, in the absence of the gutters or hangers, he was liable to fall to the ground. It is a matter of common knowledge that gutters are placed upon roofs to carry off the rainwater that may fall upon them; and further a matter of common knowledge that gutters are never made or attached to the roof except as the roof is being put on or after its completion.

We think it manifest that in undertaking the work of putting on the roof as appellees' foreman appellant assumed whatever risk grew out of the performance of the work. It was such work as could only have been done or directed by a person of his skill and experience. Being in charge of the work it was his duty to use ordinary care to so perform it as that no injury would result to himself or the other workmen under his control, and, notwithstanding the averments of the petition that the roof was an unsafe place to work, and that this fact was not known to him, but was known, or by the exercise of ordinary care could have been known, to appellees, it is, nevertheless, patent that it was known to him, or could have been known by such an inspection of the roof as his duty as foreman required him to make before beginning work upon it. He was charged with the duty of inspecting the roof as well of doing or causing to be done the work of putting on the tile. If, the doing of the work in the manner attempted by him was dangerous because of the absence of gutters or hangers to the roof, he should have deferred beginning work upon it until he could give information of such danger to appellees that they might have had an opportunity to supply gutters, hangers or other appliances that would have made the performance of the work of putting on the roof reasonably safe. If appellant had been a young and inexperienced employe and had gone to work upon the roof without knowledge of the danger, or under an assurance from appellees that it was reasonably safe for him to do so, it would present a different state of facts upon which the liability of the latter might be made to rest, but no such contention is here made.

In *Russell v. W. E. Caldwell Co.*, 158 Ky., 229, there was an attempt upon the part of Russell to recover damages for injuries resulting, as alleged, from the negligence of his employer, W. E. Caldwell Co. The injuries resulted while he was repairing the roof and guttering of a building owned by the latter. In the opinion it is said:

"It will be observed that there is no allegation that the defendant corporation assumed any control over the work of making repairs, and there is no allegation that the plaintiff was at the time of the injury working under immediate supervision or direction of any superior officer or employe of the company; nor is there any allegation that the plaintiff was an inexperienced workman. One who is employed to do repair work upon a roof and guttering of a building, from the very nature of things knows in advance that his employer is not undertaking to furnish him a reasonably safe place in which to work; because if the place was not out of repair, and therefore in some measure dangerous, he would not have been employed to repair it, and under such conditions the employe necessarily assumes the additional risk growing out of the then conditions of the place."

In *Ballard & Ballard v. Lee's Admr.*, 131 Ky., 412, Lee had been employed to take the roofing off of an old building, and while so employed fell from the roof and was killed. In that case we said:

"It seems to us that if an owner of a house employs a competent and experienced laborer to take off an old roof and put on a new one, or to repair the roof, or to tear down a building, it is fair to assume that the employe will take the necessary precautions to protect himself from injury on account of the dangerous or defective condition of the premises about which he is engaged to work, and that it would be imposing upon the employer an unreasonable duty to require him to have a careful examination of the premises made for the purpose of discovering defects or dangers in order that he might inform the employe concerning them."

The work attempted to be done by appellant was in itself hazardous and the danger of its performance obvious to a person of even less experience than was possessed by him. Being in charge of the work as foreman because of his experience and skill, he will not be heard to say that he did not know of the danger. Therefore,

such risks as would ordinarily be incident to such work must be regarded as having been assumed by him. The duty of the master with respect to the furnishing of a safe place or safe premises for the performance of such work as fell to the lot of appellant can have no application. Therefore, the master is not, in a case like this, charged with the duty of exercising ordinary care to discover the dangerous or unsafe place, and is not liable in damages for an injury to the servant because of the dangerous condition, for the danger being obvious, the duty of protecting himself against it is shifted to the employe. So, assuming in this case that appellant's injuries were received as alleged in the petition, as the conditions which caused them were openly visible to him and the work was to be performed in accordance with his judgment as appellees' foreman, there being no assurance by the appellees of the safety of the place (even if such assurance under the circumstances could have shifted the liability), nor promise by appellees to provide other appliances of greater safety, we can but hold that appellant assumed the dangers incident to the performance of the work, for which reason he cannot recover damages. *Wilson v. Chess & Wymond Co.*, 117 Ky., 567. It is our conclusion, therefore, that the demurrer was properly sustained, wherefore the judgment is affirmed.

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### **Louisville Railway Company v. Kennedy.**

(Decided February 5, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas, Fourth Division).

1. Street Railroads—Injury to Pedestrian—Failure to Look for Approaching Car—Contributory Negligence—Question for Jury.—Plaintiff, after alighting from defendant's street car, passed around the rear end of the car, and in attempting to cross the parallel track, was injured by another car approaching thereon from the opposite direction. Held, that the question of plaintiff's contributory negligence, though she failed to look for the approaching car, was for the jury.
2. Street Railroads—Parallel Tracks—Duty While Approaching Car Stopped to Discharge Passengers—Reasonable Control.—It is the duty of the motorman on a street railroad car, in approaching a car stopped on a parallel track for the purpose of discharging

passengers, to have the approaching car under such control that it may be stopped at a moment's notice.

**FRANK P. STRAUS, HOWARD B. LEE and ALFRED SELIGMAN** for appellant.

**O'DOHERTY & YONTS** for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.**

This is a personal injury case, in which plaintiff, Blanche Kennedy, recovered of the defendant, Louisville Railway Company, a judgment for \$800. The railway company appeals.

Refusal to direct a verdict in favor of the defendant, and error in one of the instructions, are relied on as grounds for a reversal.

The facts are these:

On July 8, 1913, plaintiff was a passenger on a west bound Bardstown Road car, which was moving on the north side of Jefferson Street along one of two parallel tracks. When the car reached the northeast corner of Jefferson and Third Streets, it stopped for the purpose of permitting passengers to alight. Plaintiff got off at this point, and passing around the rear end of the car, started to cross the parallel track for the purpose of reaching the opposite side of the street. When she reached the parallel track, she was struck and injured by a Fourth Street car then being operated on the Second Street line. There is substantial evidence to the effect that the Fourth Street car was being operated at a high rate of speed, and that no warning of its approach was given.

It is insisted that because plaintiff did not look at the approaching Fourth Street car before she stepped on the parallel track she was guilty of contributory negligence as a matter of law. It may be conceded that while a different rule formerly prevailed, a number of the courts now make no distinction between steam railroads and street railroads with respect to the obligation of the pedestrian to look for an approaching car, because they say the danger from stepping on street car tracks where the cars are run by electricity and at a rapid rate and with greater frequency, is quite as great as the danger from stepping on steam railroad tracks, where the cars do not run so often; and common prudence requires that the care on the part of the pedestrian shall be increased in

proportion to the dangers to be apprehended; and they therefore hold that a person who, upon alighting from a street car, passes around the rear end of the car without looking for a car approaching from the opposite direction on the parallel track, and is struck by such car and killed or injured, is guilty of contributory negligence which will defeat a recovery for the injury. *Creamer v. West End St. R. Co.*, 156 Mass., 320, 31 N. E., 391, 32 A. S. R., 456, 16 L. R. A., 490; *Weber v. Kansas City Cable R. Co.*, 100 Mo., 194, 12 S. W., 804, 13 S. W., 587, 18 A. S. R., 541, 7 L. R. A., 819; *Hornstein v. United R. Co.*, 195 Mo., 440, 92 S. W., 884, 113 A. S. R., 693, 6 Ann. Cas., 699 and note, 4 L. R. A. (N. S.), 729 and note; *Eagen v. Jersey City, etc., R. Co.*, 74 N. J. L., 699, 67 Atl., 24, 12 Ann. Cas., 911 and note, 11 L. R. A. (N. S.), 1058; *Yersack v. Lackawanna, etc., R. Co.*, 221 Pa. St., 493, 70 Atl., 837, 128 A. S. R., 746, 18 L. R. A. (N. S.), 519. In other jurisdictions, however, a different rule prevails, and it is held that a failure to look does not bar a recovery, but the question of contributory negligence is for the jury. *Chicago City R. Co. v. Robinson*, 127 Ill., 9, 18 N. E., 772; *Smith v. Union Trunk Line*, 18 Wash., 351, 51 Pac., 400; *Cincinnati Street R. Co. v. Snell*, 50 Ohio St., 197, 43 N. E., 207; *Birmingham R., Light & P. Co. v. Landrum*, 153 Ala., 192, 45 So., 198; *Bremer v. St. Paul R. Co. (Minn.)*, 120 N. W., 382, 21 L. R. A., 887. The same rule prevails in this State. *Louisville Ry. Co. v. Hutchins*, 124 Ky., 79, 98 S. W., 275, 7 L. R. A. (N. S.), 152; *Creamer v. Louisville R. Co.*, 142 Ky., 340; *Louisville R. Co. v. Mitchell*, 138 Ky., 190. Indeed, with the single exception of a person who was stone deaf and therefore unable to discover the approach of the train except by the use of his eyes, we have never held, even in the case of steam railroads, that a failure to look would constitute contributory negligence. *C., N. O. & T. P. R. Co. v. Winningham's Admr.*, 156 Ky., 434; *Smith's Admr. v. C., N. O. & T. P. R. Co.*, 146 Ky., 568. There is, therefore, no necessity on our part to change the rule with respect to street railways, in order to keep pace with the progress of the times, as was the case with the Supreme Court of Missouri. Under our rule, the pedestrian is required to exercise that degree of care that an ordinarily prudent person would exercise, under like or similar circumstances, to learn of the approach of the car and keep out of its way. The degree of care will necessarily vary with the circumstances of each particular case. It is therefore our rule to let the jury deter-



mine the question in the light of all the circumstances. The reason for our position is well illustrated by the facts of this case. Here the parallel tracks lay close to each other. The plaintiff's attention was directed towards a second street car approaching on the north track from the rear. Her view of the car which struck her was obscured until she passed from behind the rear of the car on which she was riding. She had a right to presume that proper warning of the approaching car would be given, and that the car itself would be under proper control, and was not, therefore, required to anticipate negligence on the part of those in charge of the car, and to regulate her conduct accordingly. The question, therefore, was whether or not plaintiff, acting on the presumption that the company would not be negligent, failed to exercise proper care under the circumstances. Viewed from this standpoint, we think plaintiff's conduct afforded room for honest difference of opinion among intelligent men, and the court did not err, therefore, in submitting the question of contributory negligence to the jury.

(2) It is next insisted that the court erred in instructing the jury that it was the duty of the motorman in charge of the approaching car to have it under such control that it might be stopped at a moment's notice. It is argued that the word "moment" means a space of time incalculable or infinitely small, and that the instruction imposes on the street car company a duty impossible of performance. In spite of counsel's strong argument to the contrary, we see no reason to depart from the rule thus laid down, which, after due deliberation, was declared in the case of *Louisville Ry. Co. v. Hutchins*, 124 Ky., 79, 7 L. R. A. (N. S.), 152, 98 S. W., 275, and thereafter approved in *Louisville Ry. Co. v. Mitchell*, 138 Ky., 190, and *Louisville Ry. Co. v. Cremer*, 142 Ky., 340. Where a car on a parallel track is approaching another car which has stopped to discharge passengers, other courts have recognized the necessity for a high degree of caution under the circumstances. Thus it is said that "when a train is stopped to let off or take on passengers, a train on the reverse course should not be allowed to pass the stopping train except it be on such caution and noticeable signals as will be reasonably calculated to avoid the possibility of injury to passengers. *Capital Traction Co. v. Lusby*, 12 App. D. C., 295. In the case of *Bremer v. St. Paul R. Co.*, *supra*, a duty was imposed on the motorman of having his car under such control that he could stop it

"upon the appearance of danger." The reason for the rule is apparent. When a car stops to permit a passenger to alight, he is still a passenger until he has had a reasonable opportunity to reach a place of safety. He has no opportunity to observe the approach of a car until near the parallel track. He cannot be seen by the motorman of the approaching car until he emerges from behind the waiting car. The fact that the car is stopped to discharge passengers makes it reasonably certain that some of the passengers will attempt to cross the parallel track. It being reasonably certain that passengers will attempt to cross the parallel track, and that their presence cannot be detected until they emerge from behind the waiting car, there is necessarily great danger from accidents. Since there is neither opportunity for the passenger to observe the approaching car, nor for the motorman on the approaching car to observe the passenger until he suddenly emerges from behind the waiting car, the danger is even greater than if he were actually standing on the parallel track. In view of these circumstances, proper care is not exercised unless the approaching car is under such control that it may be stopped on a moment's notice. *Louisville R. Co. v. Mitchell, supra.*

Judgment affirmed.

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### **Armstrong v. Fiscal Court of Carter County.**

(Decided February 5, 1915.)

Appeal from Carter Circuit Court.

1. Elections—Submission of Question to Voters—Compliance With Statutes.—In the submission of public questions to the voters, a substantial compliance with the Statute as to the manner and form of submission is sufficient; but where the submission is in such ambiguous and unintelligible form as to be confusing to the elector, or as to make it uncertain how he shall mark his ballot so as to register his intention, the election will be held invalid.
2. Elections—Purpose of Holding Elections.—The purpose of holding elections is to ascertain the public will, and neither the courts nor the election authorities are authorized to arbitrarily assume that the voters meant something which cannot be fairly ascertained from the ballots themselves.
3. Elections—Ambiguity.—The question: "Are you for or against voting bonds on the county of Carter, State of Kentucky, for the purpose of building roads and bridges to the amount of one hun-

dred and fifty thousand (\$150,000) dollars in Carter County?" is in such ambiguous form as that the electors might well have differed as to the manner of marking their ballots so as to register their several intentions; therefore the will of the voters could not well be ascertained under such a submission.

THEOBALD & THEOBALD for appellant.

THOMAS S. YATES for appellee.

OPINION OF THE COURT BY JUDGE TURNER—Reversing.

The Fiscal Court of Carter County, acting under the provisions of the Legislative Act of 1914 (page 338), at its regular term in August, 1914, after the filing of the petition required by the act, entered an order calling an election in that county for Tuesday, November 3rd, 1914, for the purpose of ascertaining the will of the legal voters of that county as to whether there should be issued by the fiscal court thereof \$150,000 in bonds of the county, the proceeds thereof to be used exclusively for the building, or construction, or reconstruction of roads.

Section 21 of the act of 1914 provides "the question 'are you in favor of issuing \_\_\_\_\_ in bonds for the purpose of building roads and bridges?' shall be printed on the ballot as provided in the general election law, Sec. 1459, Kentucky Statutes."

The Section 1459 referred to in that act provides: "Whenever a constitutional amendment or other public measure is proposed to be voted upon by the people the substance of such amendment or other public measure shall be clearly indicated upon the ballot, and two spaces shall be left upon the right of the same; one for votes favoring the amendment or public measure to be designated by the word 'Yes,' and one for votes opposing the amendment or measure to be designated by the word 'No.' "

The order of the fiscal court calling the election followed these statutes closely, and directed that "the following question shall be caused to be printed on the ballot to be used at said election as provided for in the general election law, Section 1459, Kentucky Statutes: 'Are you in favor of issuing One Hundred and Fifty Thousand (\$150,000) Dollars in bonds for the purpose of building roads and bridges?' "

Up to this point there was not only a substantial, but a literal and strict compliance with the requirement of the statute as to the form in which the question should be submitted; but when it came to the preparation of the ballot, in some way which is not clearly explained, there was printed thereon and the question was actually submitted to the electors in the following form, to-wit:

"Are you for or against voting bonds on the County of Carter, State of Ken- tucky, for the purpose of building roads and bridges to the amount of (\$150,000) One Hundred and Fifty Thousand Dol- lars, in Carter County?"	<input data-bbox="742 409 806 475" type="checkbox"/> YES  <input data-bbox="742 500 806 566" type="checkbox"/> NO
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This is an agreed action between appellant, a taxpayer of Carter county, and the fiscal court, upon an agreed statement of facts to test the validity of the election and consequently the proposed bond issue.

The agreed statement of facts raises two questions; first, the sufficiency of the advertisement of the election, and, second, the sufficiency of the form in which the question was actually submitted to the electors; but appellant, in his brief, waives the first question and concedes that the advertisement was sufficient, so that the second question is the only one with which we are concerned.

The board of election commissioners of Carter county certified the result of said election as follows:

"On the question are you for or against issuing bonds to the amount of \$150,000 for the purpose of building roads and bridges in Carter county, Kentucky—for 2,465, against 1,079."

From this certificate it may be presumed that the election commissioners assumed that the ballots marked "yes" were voted in favor of the bond issue, and those marked "no" voted against it.

The judgment of the lower court upheld the validity of the election, and thereby inferentially held that the form in which the question was submitted was a substantial compliance with the law, and from that judgment the taxpayer has appealed.

This court has several times decided that in the submission of public questions a substantial compliance with the requirement of the statute as to the manner and form of submission is all that is required; but it has at no time held that the submission of a question in such

an ambiguous and unintelligible form as to be confusing to the elector, or in such form as to make it uncertain how he shall mark his ballot so as to register his intention, and so as to have it counted in accordance with such intention, was sufficient. Of the 2,465 ballots marked "Yes" it cannot be said with any degree of certainty, under the form of submission in this case, that all of those electors intended to vote for the bond issue; it can be said with just as much reason that they all intended to vote against it. An affirmative vote on the submission of the question of whether one is for or against a given proposition is nothing more nor less than a vote both for and against it; and a negative vote on a question so submitted can mean nothing more nor less than the elector is neither for nor against it. In other words, an affirmative vote is both for and against the proposition, and a negative is neither for nor against it, so that in reality there is no practical difference between an affirmative and a negative vote.

Of course, the courts might arbitrarily assume that the ballots marked "Yes" were in favor of the bond issue, and that the ballots marked "No" were against it, as did the county election commissioners; but, in the absence of a fairly intelligible submission in a form reasonably free from ambiguity by which it may be determined with at least some degree of accuracy how the electors intended their ballots to be counted, it would be an unjustifiable assumption of authority by the court to say that these 3,500 voters meant by marking their ballots in a certain way something that cannot be fairly ascertained from the ballots themselves, by reason of the form in which the question was submitted.

The fact that the election commissioners certified that 2,465 votes were cast for the bond issue and 1,079 against it, under the form of the question submitted, cannot conclude the question; certainly, if the courts, under the circumstances, have no right to guess how the electors intended to vote, the election commissioners would not have. If the submission is made in such ambiguous and uncertain form as that voters may reasonably differ as to the effect of marking the ballot in a particular way, or in such form as to leave the authorities charged with the duty of counting the ballots and certifying the results in doubt as to the intentions of the voters who marked their ballots in a certain way, there can be no doubt the election is invalid.

The purpose of holding elections is to ascertain the public will, and it is too plain for argument that in such cases that will cannot be told from the ballots, and neither the courts nor the election authorities are authorized to arbitrarily assume that the voters meant something which cannot fairly be ascertained from the ballots themselves.

It is not the purpose of this court to set aside the will of the people in this or any election, but the highest considerations of public policy require that when electors are called upon to vote a bond issue to burden their own and future generations, the question should at least be submitted to them in such intelligible form as that they may know with some degree of certainty how to mark their ballots so as to express their intentions, and so that intention may be reasonably ascertained from the ballots by the authorities whose duty it is to count them.

We are constrained to hold that the form of submission in this case was so confusing and unintelligible as that the voters might well have differed as to how they must mark their ballots to properly register their intentions, and for that reason the election is void.

The judgment is reversed with directions to enter a judgment setting aside the election.

Whole court sitting.

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### Taylor, et al. v. Fuller, et al.

(Decided February 5, 1915.)

#### Appeal from Perry Circuit Court.

1. Liens.—Statements or acts of a lienor can not estop him to claim a lien as against the owner, where the owner was not misled or induced to change his position by the statements or acts.
2. Liens—Waiver.—To establish a waiver of a lien, it must clearly appear that the lienor so intended, and that the waiver was based upon a valuable consideration.

JOHN B. EVERSOLE for appellants.

J. E. JOHNSON and J. M. BARKER for appellees.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

The appellant, Hazard Dean Coal Company, was a company engaged in mining coal in Perry county, Kentucky, and the appellant, J. M. Taylor, was a contractor for the Hazard Dean Coal Company, with a contract to build a number of houses for the coal company upon its premises, in which its miners were to live. Appellees, W. J. Fuller and J. H. Elam, were two carpenters who were employed by J. M. Taylor to assist in constructing the houses which he was building for the Hazard Dean Coal Company. It seems that they commenced work about the middle of October and were to be paid the sum of two dollars per day for their services, and they ceased to work about the 24th day of December. It seems that during this time, probably the first regular pay day of the company which occurred after they began to work, they went to the company's office with Taylor, and, by his directions, the manager of the company paid each of them a part of the wages which were due them for their work at that time. At the two other regular pay days of the company which occurred during their employment, they were present when the manager paid a sum of money to Taylor, and on each occasion he immediately, but not at the office of the company, paid each of them a portion of what their wages amounted to at that time. They seemed to understand that, according to the custom or regulation prevalent in that community, or at least with the employees of the coal company, they were not to be paid in full on any pay day, but a certain amount of their wages was to be reserved; but, at the time they quit work, Taylor owed Elam a balance of \$12.20, and he owed Fuller a balance of \$57.50. There seems to be no controversy about the amount of the indebtedness in either case. On the 5th day of January, following, they, each of them, caused a notice to be served upon the company, notifying it of the amount which was due them for their services and their purpose to file in the clerk's office of the county court a lien upon the houses upon which they had worked, and the lands upon which the houses were situated to secure them in the payment of the amounts due them. Thereafter, on the 11th day of February, 1914, each of them filed and caused to be recorded in the clerk's office of the Perry County Court a statement, subscribed and sworn to by them, as provided for by Chapter 79 of the Kentucky Statutes, and the amend-

ments thereto, showing the amount due each of them, and that there were no off sets against them, and upon what property they asserted a lien, and thereafter, on the 14th day of February, they filed a petition in equity in the Perry Circuit Court against J. M. Taylor and the Hazard Dean Coal Company, in which they sought a personal judgment against Taylor and the enforcement against the coal company of their lien upon the property to satisfy the indebtedness above stated.

The appellant coal company relied for its defense against the enforcement of the lien upon the fact, as they alleged, that the appellees had waived their lien, and further, by their acts and conduct, they were estopped to assert or enforce their lien. Upon this issue the proof of the case seems to have been taken. The coal company introduced evidence showing that they had entirely paid Taylor the price they were to pay him under his contract, upon the pay days heretofore mentioned, and that one Heath, who seems to be some kind of an agent of the company, and who had supervision of the construction of the houses and the mining of the coal, had requested Fuller and Elam to make a report of the number of days they had worked, from time to time, to the company, and said to them that it would pay them their wages, but that, for some reason or other, Fuller and Elam did not desire to do so, and failed to do so. As to whether or not this notice was ever received by them was a matter of serious controversy in the testimony, since they each deny positively that Heath ever made any such request of them, except in the case of Fuller, who stated that Heath had directed him to do that, after he had quit work, and that, in accordance with that direction, he had applied to the manager of the coal company, who declined to pay him anything; but whether the contention of the company is correct or not in that regard there does not seem to have been any obligation upon either Fuller or Elam to make report of their time to the company, because they were employed by Taylor, and were acting under his directions, and each testified that Taylor informed them that he reported the time they had each worked to the company, and Taylor testified that he had paid to each of them all of the money which the company had paid him for them.



As to the estoppel plead, it does not appear from the evidence that the coal company was led to pay Taylor the entire amount of the price of building the houses which it had contracted to pay him, nor in any wise caused the company to do or not to do anything with regard to the matter.

The rule bearing upon the waiver of a lien, as expressed in 25 Cyc., 672, is, that a lien may be waived by an express agreement, based upon a valuable consideration, or it may be waived by implication, the question whether or not there is a waiver in a particular case being one of intention to be determined by the circumstances.

That there was any express agreement on the part of either Fuller or Elam to waive their lien no one contends, and there is no contention that there was any consideration for the waiver upon the part of either of them, and we do not find any conduct of either of them which is inconsistent with the existence of the lien.

In 27 Cyc., 262, it is said: "That in order to establish a waiver of a lien the intention to waive must clearly appear, and the waiver of a lien will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party was misled to his prejudice into the honest belief that some waiver was intended or consented to."

The mere fact that Taylor testified that Fuller said to him during the progress of the work that he was looking to him for his wages would not amount to a waiver of a lien, because, even if he had taken Taylor's promissory note for the debt, it would not have discharged the lien, unless the note had been paid. (*Mivalaz v. Genovely*, 28 R., 203.)

In 27 Cyc., 277, it is said: "Statements or acts of a lienor cannot estop him to claim a lien as against the owner, where he was not misled or induced to change his position thereby."

There is no evidence for the appellants in this case which even tends to show that the appellant coal company was misled or induced to change its position with regard to the matter in controversy by any statement or act of either Fuller or Elam.

It appearing that the appellees come within that class, who, by the provisions of Chapter 79 of the Ken-

tucky Statutes, are entitled to assert a lien upon the property of the appellant coal company for the unpaid balance of the wages due each of them, and the appellees having complied with the statute by giving the notice, and filing the statements which are required by law to perfect their lien, it is, therefore, adjudged that the judgment appealed from be affirmed.

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**Louisville & Nashville Railroad Company, and Wasioto & Black Mountain Railroad Company v. Davis.**

(Decided February 5, 1915.)

**Appeal from Bell Circuit Court.**

1. Railroads—Trespassers Upon Tracks.—One is not licensed to travel longitudinally upon a railroad track, because the public road nearby has been obstructed, either by the railroad company, or some other person, and is thereby made inconvenient to travel. The employees of the railroad company are not required to anticipate the presence of persons upon the track of the railroad, except at public crossings, and in populous communities, like cities and villages.
2. Railroads—Trespassers Upon Tracks—Lookout Duty.—The employees of the railroad company do not owe a trespasser any lookout duty, and only owe him the humane duty of using ordinary care to prevent doing him injury, after they shall have discovered his peril.

BENJAMIN D. WARFIELD and WM. LOW for appellants.

N. J. WELLER for appellee.

**OPINION OF THE COURT BY JUDGE HURT—Reversing.**

The appellee, Jesse Davis, sued the appellants, Louisville & Nashville Railroad Company, and the Wasioto & Black Mountain Railroad Company, in the Bell Circuit Court, complaining that one of the trains operated by the last named appellant, by the gross negligence and carelessness of its servants, had been run against him while he was walking on the track of the Wasioto & Black Mountain Railroad Company, on the 13th day of December, 1911, cutting and bruising his head, back and legs, and causing him great suffering and permanent impairment of ability to earn money, and asking a judg-

ment against the two railroads for the sum of \$10,000.00 in damages. The basis for his suit as developed by his petition was, that a county road extended from Clear Creek, on the south side of Cumberland River, and up said river to the mouth of Patterson's Branch, and from thence on to Cannons Creek, and that two or three years before his injury the defendant railroads, in constructing the Wasioto & Black Mountain Railroad, had located the road bed of that railroad from the mouth of Patterson's Branch down to its intersection with the main line of the Louisville & Nashville Railroad, immediately in the bed of the county road, and had utterly destroyed that road and rendered it impassible, and that thereafter, and up to the time of the injury, the public in traveling from the mouth of Patterson's Branch down to the place where the two railroads intersect, had used the tracks of the Wasioto & Black Mountain Railroad as a public thoroughfare, because they had no other road upon which they could travel between said points on account of the destruction of the county road, and that he, in going from the mouth of Patterson's Branch to Mill Rice, a point on the right of way of the Louisville & Nashville Railroad Company, and near the intersection of the two roads, while walking on the track of the railroad, early in the morning, and while he was using ordinary care for his own safety, the employes of the defendants negligently and carelessly ran their train over him, causing the injury complained of. He insists that under the facts stated, that he was traveling at a point where he had a right to be, and that the railroad company owed him a lookout duty, which they did not perform.

The railroad companies filed a joint answer, in which they traversed all of the allegations of the petition and also, in addition to that, made a plea of contributory negligence on the part of the appellee, which he by reply denied.

Upon these issues the case was tried, and at the close of the evidence for the plaintiff the appellants asked the court to instruct the jury to find a verdict for them, and this motion having been overruled by the court, they complain. The trial resulted in a verdict and judgment against the appellants for the sum of \$7,000.00. The appellants filed grounds and made a motion to set aside the verdict and judgment and to

grant them a new trial, which motion the court below having overruled, they appeal to this court.

In addition to the refusal of the court to give the jury a peremptory instruction to find for them, they also complain that the court failed to instruct the jury properly in the giving of instructions number one, two, and three, and to which they objected at the time, and also complain that the verdict of the jury was excessive.

In order to determine whether the court below was in error because of its refusal to give the peremptory instruction asked for, it will be necessary to make a statement of the facts which the evidence for the appellee tends to prove, and to see whether or not, under those facts, he was entitled to have his case submitted to the jury.

It seems from the evidence that the main line of the Louisville & Nashville Railroad Company passing through Pineville and on to Middlesboro crosses the Cumberland River at Wasioto, and at that point it extends up the Cumberland River and near to it to the mouth of Patterson's Branch, at which point it turns and goes up Patterson's Branch and on to Middlesboro. The Louisville & Nashville Railroad Company acquired its right of way from where it crosses the Cumberland River to the mouth of Patterson's Branch in 1888 or 1889. The Wasioto & Black Mountain Railroad Company intersects with the Louisville & Nashville Railroad on the south side of the Cumberland River, near Wasioto, and from thence it proceeds up the Cumberland River, and between the tracks of the Louisville & Nashville Railroad Company and the Cumberland River, to the mouth of Patterson's Branch, at which point it quits the neighborhood of the Louisville & Nashville Railroad track and proceeds up the Cumberland River to Harlan county.

It seems that for a great many years last passed, and as far back as forty years, there had been a pass-way, which amounted to not much more than a mere trail, which extended from the mouth of Clear Creek, which is west of the intersection of the two railroads, and ran south and east along the Cumberland River, crossing the Louisville & Nashville Railroad at a point near the intersection of the two railroads, and from thence on up the Cumberland River to the mouth of Patterson's Branch, between the Louisville & Nashville

Railroad tracks and the Cumberland River. This road, from where it crossed the Louisville & Nashville Railroad tracks, and for a distance of three hundred or four hundred yards, ran between the tracks of the Wasioto & Black Mountain Railroad and the Cumberland River, and at the end of said three or four hundred yards, and on to the mouth of Patterson's Branch, the road contended for had been taken up by the grade and tracks of the Wasioto & Black Mountain Railroad, and the railroad had been substantially built in this road bed. The evidence further shows that, between the place where this dirt road comes in contact with the track and grade of the Wasioto & Black Mountain Railroad, and on down the river to where it crossed the track of the Louisville & Nashville Railroad, its bed was twenty or thirty feet from the tracks of the Wasioto & Black Mountain Railroad. On the morning upon which Davis suffered his injury he was living at the mouth of Yellow Creek, near the Wasioto & Black Mountain Railroad, and about two miles east of Patterson's Branch; that he left home early in the morning, and as quick as he got to the railroad track he got upon it and walked on down, going past the mouth of Patterson's Branch, and on down to a point which some of the evidence shows was sixty yards, and some of it shows one hundred and sixty yards, beyond the place where the so-called county road had been taken up by the building of the railroads, when he was suddenly struck by a train coming behind him from the south, which knocked him off of the track with such force that he was rendered unconscious; and that he had not been able to perform manual labor since that time. His statement is that he did not hear the train coming behind him; that he heard no signals of any kind, and was not aware of its approach until it struck him; that he had not looked back or looked out for any trains on the road. Some of his witnesses who lived nearby stated that just about the time it is said he was struck by the engine of the train, that they heard one or more sharp whistles, which the engineer gives as warning to any one who is suddenly discovered in a perilous situation.

The appellee below offered and read to the jury an order of the Bell County Court, made on the 11th day of August, 1903, by which it ordered a public road to be established, "beginning at the mouth of Big Clear

Creek, on the south side of the railroad, and about forty yards from said road, at the present county road, thence at an angle from the railroad, and up the hill for a distance of forty yards; thence running nearly south and parallel to the right of way of the Louisville & Nashville Railroad Company above or south of said right of way, to a corner of H. P. Browning's inclosure around his house, crossing the said Louisville & Nashville Railroad Company at right angles; thence up the river parallel with and adjoining the north right of way line of the said railroad, to Patterson's Branch, a short distance above its mouth, so as to intersect with the public road leading up said branch and no further." The proof further shows that after this order was made in the Bell County Court surveyors or overseers were appointed for this road established by this order, and for a number of years thereafter they did some kind of work upon this road. The Louisville & Nashville Railroad Company was made a party to this proceeding in the county court, which resulted in the judgment of the county court establishing the road as above stated. It does not, however, appear that any road was ever opened along the places designated in the judgment, but that the public continued to travel the old trail, which had existed there for many years, and the work, if any, that was done by the overseers and those assisting them was done upon this old trail. Whether any part or what part of this old dirt road is upon the right of way of the Louisville & Nashville Railroad does not appear from the proof, which is hardly intelligible upon that point, as it appears that on the trial below diagrams were used by each of the parties in introducing their evidence, and the witnesses testified in reference to these diagrams, but the parties have not seen fit to enlighten this court by having either of the diagrams included in the record. It is conceded that from the point of the intersection of the two railroads and on towards Patterson's Branch, from that point, that both of the railroad tracks are built upon the right of way owned by the Louisville & Nashville Railroad Company for a considerable distance, and at the point where the appellee received his injury both railroads were upon the right of way of the Louisville & Nashville Railroad Company; but it is impossible to see from the evidence whether the dirt road opposite that point is upon the

right of way of the Louisville & Nashville Railroad or not. It seems that at the point where the dirt road intersects with the Wasito & Black Mountain Railroad track, the railroad track is laid upon a fill, which the witnesses variously estimate to be from two to ten feet in height, and that this fill continues on down the river a considerable distance, and to the point where the appellee received his injury. It, however, appears from the evidence that persons on horseback or upon foot so, as to travel the dirt road, have been going down the embankment at the place where the dirt road leaves the road bed of the railroad, but that two weeks before the appellee received the injury the section hands upon the railroad had thrown mud and stones into the dirt road where it intersected with the railroad track, and that the mud and stones extended from twenty to thirty feet from the railroad track along the road toward the west.

It seems that the contention of the appellee that at the point of his injury that he was obliged to travel upon the railroad track, because it was built within the bed of the old county road, is not well taken, because at that point the railroad upon which he was walking when hit by the train was upon the original right of way owned by the Louisville & Nashville Railroad Company, and the road ordered to be opened and established by the order of the county court was not upon the right of way, but was on the north of it, and between it and the river.

As to whether or not there had been such use of the road as contended for by appellee by the public, and for such length of time, and under such conditions as to constitute it a public road, where any one had a right to travel, or as to what rights a person has to travel upon the tracks of a railroad where a public road has been, without authority, appropriated by the railroad, is unnecessary to be decided for a proper determination of this case, because at the time appellee received his injury he was then at a point upon the railroad track where it is conceded that no public road of any kind was ever located, and the road which appellee claims as a public highway was from twenty to thirty feet north of the railroad track upon which he was walking, and between the railroad track and the river. His contention that the dirt or county road, from the place

where it left the railroad track, and on down the river to and beyond his point of injury, had been filled by the section hands of the railroad with mud and stones to such an extent as to render it impassable, is not sustained by the proof, as the evidence shows that this mud only extended about twenty or thirty feet down the river from the point where the dirt road left the track of the railroad, and he was from sixty to one hundred and sixty yards down the river from said point. His other contention, that he could not get down from upon the fill, seems to be idle.

Whatever lookout duty the employes of a railroad company may be justly required to perform where the railroad tracks have been put in the streets of a city, town, or other populous community, we do not think that this rule should be extended so as to embrace persons who, with impunity, go upon the tracks of a railroad, and travel same longitudinally for their convenience or pleasure, because an adjacent highway has been obstructed, either by the railroad company or any one else, in an isolated and thinly populated community, such as the evidence shows the one where appellee's injury occurred to have been. Ample remedies have been provided by law for the county courts and for private persons to prevent, as well as for the removal of, unauthorized obstructions in public ways. To use the tracks of a railroad company as a thoroughfare for travel is in itself a dangerous and negligent act, and such acts, considering the great number of persons who suffer injuries from such carelessness, ought not to be encouraged.

As we gather from the evidence, the appellee had no right to be upon the railroad track, even under his own contention, at the place where he was injured, because directly between him and the river lay the alleged county road, and within twenty or thirty feet of him, and such had been the condition for the last sixty to one hundred and sixty yards of his travel. The contention of his counsel that, even if he had departed from the railroad track and proceeded along the alleged county road, that he would still have been upon the right of way of the railroad, and his status would have been unchanged, if he was a trespasser. However, if he had left the railroad tracks and proceeded along the dirt road, he would have been safe, and no injury would have occurred to



him. Having no right to be upon the railroad track at the time he was injured, he was a trespasser and must submit to the rules of law governing the rights of trespassers. As a trespasser the employees of the railroad company would not owe to him any lookout duty, and only owed to him the humane duty of using ordinary care to save him from injury, if they discovered the peril in which he had voluntarily placed himself. If the employees of the railroad company did not discover him at all, or discovered him too late to save him from injury, by the exercise of ordinary care upon their part, he has no cause for complaint.

In the case of *C. & O. Ry. Co. v. See's Administrator*, 79 S. W., 252, it is said: "The well settled rule in this State is that those in charge of a train owe no duty to a trespasser, except when his presence is discovered upon the track, to use reasonable care to avoid injuring him. This rule has been so repeatedly announced by this court that it would be labor lost to cite cases in its support. There is no duty reposing upon those in charge of a train to sound whistles, or ring bells, or to carry headlights to give warning to trespassers. They do not have to anticipate their presence upon the track."

The counsel for appellee, however, contends that the fact that several persons in the community where the injury occurred were in the habit of traveling upon this railroad track for their convenience in going to and fro in that community, and that the railroad company had acquiesced in that use of it, and for that reason a lookout duty was imposed upon the men operating the train, such as they are required to perform when passing a public crossing, or in a populous community of a city or town. There is, however, no evidence tending to show that the railroad company in any wise acquiesced in this use of its tracks, or, even if the company had had knowledge of this use of its tracks, it would have conferred no additional right upon the appellee in this case, for simple acquiescence on the part of a railroad company in the use of its track by the public as a pass-way, does not confer authority, or right, nor amount to a license to so use it. *Brown's Administrator v. L. & N. R. R. Co.*, 97 Ky., 228.

The same doctrine was announced by this court in the case of *Adkins' Admr. v. Big Sandy & Cumberland Railroad Company, et al.*, 147 Ky., 30.

There being no evidence conducing to show that the persons operating the train which struck appellee discovered his peril at all before he was struck by the train, or discovered it in time to have averted the injury to him, the court below ought to have sustained appellant's motion to direct the jury to find a verdict for them.

While the instructions given by the court were erroneous in failing to fix a measure of damages, and assuming that certain things existed which were issues in the pleadings and upon the proof, but having arrived at the conclusion that appellee had no case to submit to the jury, it is unnecessary to discuss the instructions.

The judgment appealed from is, therefore, ordered to be reversed, and the case remanded to the court below, with instructions to proceed in conformity with this opinion.

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### **Fentzka's Administrator v. Warwick Construction Company, et al.**

(Decided February 9, 1915.)

#### **Appeal from Jefferson Circuit Court (Common Pleas Branch, No. 1).**

1. **Limitation of Actions—Computation of Period of Limitation—Commencement of Action by Unauthorized Parties.**—The bringing of an action by an administrator under a void appointment does not stop the running of the statute. Unless there is a valid appointment and qualification of an administrator within one year after the death of the intestate no action may be maintained to recover damages for his death.
2. **Pleading—Amendments—Substitution of Parties.**—Where an action to recover damages for the death of an intestate is brought by an administrator acting under a void appointment, there is no suit in court, and nothing to amend; hence the trial court properly refused to permit to be filed an amended petition tendered and offered by the administrator after he had obtained a second and valid appointment, after the expiration of more than a year after the death of intestate.

**EUGENE HUBBARD, ALPHA HUBBARD and WALTER C. BARKER** for appellant.

**H. O. WILLIAMS and J. L. RICHARDSON** for appellee.

## OPINION OF THE COURT BY JUDGE HANNAH—Affirming.

On November 14, 1911, the Kennicott Company and the Warwick Construction Company, both Illinois corporations, were engaged in the construction of a smoke-stack for the Kentucky Electric Company in Louisville.

Charles G. Fentzka, an employe of the Kennicott Company, while at work on the stack, was killed on the day mentioned.

Six days later, on November 20, 1911, Fentzka's widow having waived the right to qualify as administratrix of his estate, the estate was, upon her motion, referred to Andrew M. Sea, Jr., the Public Administrator of Jefferson county.

On the next day Sea, as administrator of the estate of Fentzka, instituted this action in the Jefferson Circuit Court against the Kennicott Company, the Warwick Construction Company, and Jeremiah Sego, the latter company's foreman, to recover damages for the death of Fentzka.

The petition, in respect of the authority of plaintiff administrator, merely recites that Fentzka died on November 14, 1911; that at the time of his death he was domiciled in Jefferson county; and that on November 20, 1911, plaintiff was duly appointed administrator of Fentzka's estate by an order of the Jefferson County Court, and that plaintiff had qualified and executed bond as such administrator.

On December 19, 1911, the plaintiff having effected a settlement with the Kennicott Company for the sum of \$2,700, dismissed the action as to it.

Defendant, the Warwick Construction Company, filed a general demurrer to the petition, which was overruled. The issues were then completed by an answer and reply; and the case was passed from time to time until on November 22, 1913, when an amended petition, setting up the fact that on July 21, 1913, the Jefferson County Court, by a second reference, had confided to him as Public Administrator the estate of Charles G. Fentzka, was tendered and offered to be filed.

The first order of reference to Sea as Public Administrator was, of course, void because made within three months after Fentzka's death. Jackson's Admr. v. Asher Coal Co., 153 Ky., 547; Underwood v. Underwood, 111 Ky., 966; Kentucky Statutes, Section 3905.

The court overruled the motion to file this amended petition; and defendants then filed an amended answer setting up the facts in respect of the first and the second reference of the Fentzka estate to Sea as Public Administrator, and that the second reference was not had until after the cause of action for Fentzka's death was barred by the statute of limitations. The issues were then completed by an amended reply, a demurrer to which the court sustained; and, upon the declination of plaintiff to plead further, the petition was dismissed. Plaintiff appeals.

1. Appellant first contends that the question of his want of capacity to sue could be reached only by special demurrer, and that no special demurrer having been filed, the defect was waived.

Civil Code, Section 92, defines a special demurrer as "an objection to a pleading which shows (Sub-section 2) that the plaintiff has not legal capacity to sue." But the petition here involved did not show that the plaintiff had not legal capacity to sue. The allegation in respect of his appointment as administrator was such as indicated the appointment of an ordinary administrator, not a reference of the estate to the public administrator; and the want of capacity to sue is not shown upon the face of the petition.

The objection as to want of capacity upon the part of the plaintiff not appearing on the face of the petition the matter is controlled by Section 118, Civil Code, which provides that where the existence of any of the objections mentioned in Section 92 is not shown by the pleading, the question may be raised by answer or other proper pleading. There was, therefore, no waiver of the defendant in respect of plaintiff's want of capacity to maintain the action.

2. But it is insisted that such liberality in the matter of permitting the amendment of pleadings has been exercised under Section 134, Civil Code, that the trial court abused its discretion in declining to permit the filing of the amended petition tendered and offered to be filed on November 22, 1911.

It seems that some time prior to July 21, 1913, it was discovered by plaintiff that the reference of the Fentzka estate to Sea as Public Administrator, on November 20, 1911, was void, and for that reason the second reference was made on July 21, 1913.

On November 22, 1913, the amended petition was tendered and offered to be filed. It is styled Andrew M. Sea, Jr., Administrator of the estate of Charles G. Fentzka, deceased, plaintiff, v. Jeremiah Sego and The Warwick Construction Company, defendants.

So far as here pertinent, it contains the following language:

"The plaintiff, Andrew M. Sea, Jr., states that Charles G. Fentzka departed this life intestate on the 14th of November, 1911, and that at the time of his death he was a resident of and domiciled in the city of Louisville, Jefferson county, Kentucky; and that on the 21st day of July, 1913, he was by an order of the Jefferson County Court appointed by the judge of said court as administrator of the estate of said decedent \* \* \* Now comes plaintiff and adopts the petition as amended and all subsequent pleadings and steps as his pleadings and reaffirms all allegations of said pleadings and prays as therein contained."

The order overruling the motion to file this amended petition does not show who tendered and offered to file it; that is, whether Andrew M. Sea, Jr., as Fentzka's administrator under the first or void reference of the estate to him as Public Administrator, or Andrew M. Sea, Jr., as Fentzka's administrator under the second or valid reference.

But, from the language of the pleading, there can be no doubt that it was tendered by Sea in the latter capacity; and, in such capacity, legally speaking, he was a separate and distinct person from Andrew M. Sea, Jr., administrator acting under the first reference.

The amended petition was, in point of fact, an intervening petition to be made a party plaintiff, and to be substituted as plaintiff in the action, in the same measure as if A had been appointed administrator under the first reference and B under the second reference, for the first reference was invalid.

This amended petition was, in truth, the pleading of a new party attempting to be substituted as plaintiff, and it will readily be seen that its purpose was to avoid the plea of the statute of limitations, more than a year having elapsed after Fentzka's death until the valid reference to Sea as Public Administrator, so that a new action could not have been maintained.

An amendment to a pleading necessarily assumes that the person offering the amendment has something to amend. One party to an action cannot amend another party's pleading. If A and B are sued jointly and answer separately, A would not be permitted to amend B's answer.

And so, Andrew M. Sea, Jr., as administrator under the valid reference, had no petition in court to amend; in that capacity he was not a party to the action, and as such he had no pleading that could be amended.

Nor are we wholly without authority to support the views herein stated. In *Brooks v. Boston Ry. Co.*, 97 N. E. (Mass.), 760, an action to recover damages for the death of a person was instituted in the name of the decedent after her death. More than two years after her death an administrator was appointed and sought to be substituted as party plaintiff in the action originally instituted in the name of the dead person. The court held that this was not permissible, and said:

"An action at law implies by its very terms the existence of a person who has the right to bring the action. \* \* \* It is urged, however, that, under our statute allowing amendments, the administrator now appointed may be substituted as party plaintiff. The essential words of that statute are that the court may allow any other amendment in matter of form or substance in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for which it was intended to be brought. This language in plain words indicates the existence of a real plaintiff as the original instigator of the action. It gives no countenance to the idea that something phantasmal and visionary may be given a body and a substance by the aid of subsequent events. It pre-supposes a plaintiff; here there was no plaintiff. \* \* \* The present decision does not impair in any degree that which has been said in many other cases as to the liberality with which amendments are allowed under our practice. It only holds that where, in the nature of things, no person can be plaintiff and the cause of action is in suspense, an action cannot be instituted. If no action can be instituted, there is nothing to amend."

In the case at bar, until there was a valid reference of the Fentzka estate to the Public Administrator, or the valid appointment of a regular administrator, no

person could maintain an action to recover damages for his death; and the action that was instituted being absolutely and incontestably void, there was nothing to amend.

In *Smith v. Andrews*, 70 Ga., 708, it was held that the declaration in a suit upon an administrator's bond commenced by an attorney who was also ordinary (probate judge) of the county, and had jurisdiction of the administration, could not be amended by substituting the name of another attorney for the plaintiff; the institution of the action by the first attorney being in contravention of law, there was no suit to amend.

See also *Thayer v. Farrell*, 11 R. I., 305, and *Armstrong v. Bean*, 59 Tex., 492, in which latter case it was said that the substitution of plaintiff, even if allowed, could have had no other effect than the filing of an original petition.

2. In *L. & N. v. Brantley's Admr.*, 106 Ky., 849, 21 R., 473, 51 S. W., 585, the court held that if an administrator qualifies within one year from the injury, i. e., before the action was barred, he is given another year in which to bring an action to recover damages therefor; but that, unless an administrator qualifies within one year, the bar is complete.

In the case at bar Fentzka died on November 14, 1911. There was no valid appointment and qualification of an administrator or reference to the public administrator until July 21, 1913. And there having been no valid qualification of a personal representative within a year after Fentzka's death, the cause of action thereon was barred by the statute. See *Carden's Admr. v. L. & N.*, 101 Ky., 113, 39 S. W., 1027.

In *Boughner v. Sharp*, 144 Ky., 320, 138 S. W., 375, *Jacova N. Boughner* died the owner of certain notes. They had not been reduced to the possession of her husband during her lifetime, and at her death, therefore, passed to her personal representative. *J. W. Boughner*, husband of *Jacova N. Boughner*, after her death, transferred the notes to his brother, *W. J. Boughner*. *J. W. Boughner*, *W. J. Boughner*, and *G. F. Boughner*, a son of *J. W. Boughner*, brought a suit to enforce the collection of the notes mentioned. In that case the court held that as none of the plaintiffs had any right of action on the notes, the action instituted by them did not stop the running of the statute of limitations. Be-

fore the case was finally submitted the personal representative of Jacova Boughner was made a party plaintiff. The court said the personal representative did not qualify until after the cause of action was barred by limitation, and he therefore had no cause of action on the notes; that the action was not begun by him until he filed his petition and was made a party; and that the pendency of the action by unauthorized persons did not affect the running of the statute.

In the case at bar the institution of the action by an administrator acting under a void appointment or reference did not stop the running of the statute, so that the action was barred at the time of the second or valid reference of the Fentzka estate to the Public Administrator; and, in addition, there having been no valid appointment of a personal representative or reference to the Public Administrator within one year after Fentzka's death, the administrator had no right to prosecute the action by virtue of the appointment or reference of July 21, 1913.

Judgment affirmed.

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### **Burchett, et al. v. Clark, et al.**

(Decided February 9, 1915.)

#### **Appeal from Floyd Circuit Court.**

1. **Tenancy in Common—Mutual Rights, Duties and Liabilities of Co-tenants—Adverse Possession.**—A tenant in common may hold land adversely to the other owners, but the statute of limitations will not begin to run until notice of such adverse holding is given to the tenants in common not in possession.
2. **Tenancy in Common—Mutual Rights, Duties and Liabilities of Co-tenants—Actions Between Co-tenants.**—A tenant in common may recover judgment for his undivided interest in the common estate in ejectment against a co-tenant claiming the whole estate by virtue of adverse possession ripened into title.
3. **Partition—Actions for Partition—Proceedings and Relief—Parties.**—A valid partition of land may not be had unless all the tenants in common are before the court when the decree is rendered.

**JAMES GOBLE and W. W. WILLIAMS** for appellant.

**MAY & MAY and S. C. FERGUSON** for appellee.



OPINION OF THE COURT BY JUDGE HANNAH—Affirming in part and reversing in part.

In 1863 Hiram G. Clark died intestate, domiciled in Floyd county, and the owner of a large boundary of land on Buffalo Creek therein.

There survived him his widow and ten children. The widow, Eleanor Clark, and a son, Edmond Clark, were duly appointed administratrix and administrator, respectively, of the estate.

In 1868 the personal representatives filed a petition in equity in the Floyd Circuit Court against the remaining nine children and a creditor of the decedent to obtain the sale of a portion of the decedent's real estate for the payment of his debts, his personal estate being insufficient therefor.

In that action such proceedings were had that on April 10, 1871, the Master Commissioner of the Floyd Circuit Court, under proper judgment and orders thereof, and in due form of law, sold at public outcry a portion of the real estate of Hiram G. Clark, deceased, to Calvin Clark, a son of the decedent. This sale was in due time confirmed and a deed to the purchaser was duly executed, acknowledged and approved and certified for recordation on October 10, 1877.

On March 12, 1909, seven of the living children of Hiram G. Clark, together with the heirs-at-law of two of his deceased children, instituted this action in equity in the Floyd Circuit Court against the appellants, children of Calvin Clark, deceased, in which proceeding they sought a partition of the unsold lands of Hiram G. Clark, deceased.

The defendants, by their answer, asserted that the land sought by the plaintiffs to be divided was included within the tract purchased by their father, Calvin Clark, at the decretal sale above mentioned; and also claimed the lands sought to be divided, by virtue of an adverse possession thereof by their father and themselves maintained during a sufficient period to bar the plaintiff's action.

The issues thus tendered and accepted were: (1) whether the land sought to be divided was included within Calvin Clark's purchase in the action to settle his father's estate; and (2) if not so included, had Calvin Clark and the defendants, his children acquired ownership thereof by adverse possession.

The chancellor adjudged the land sought to be divided to be the property of the heirs-at-law of Hiram G. Clark, deceased; that it was not included in the deed and purchase of Calvin Clark, and that the latter and his children had not acquired title thereto by adverse possession; and it was further ordered by the judgment that the land should be partitioned. From that judgment the defendants appeal.

1. The question as to whether the land in controversy was included within the boundary surrendered up to be sold by the personal representatives of Hiram G. Clark (which when sold in satisfaction of the debts against the estate was purchased by Calvin Clark), is purely one of fact.

The tract of land purchased at that time by Calvin Clark lies on both sides of Buffalo Creek, which, in that vicinity, runs very nearly north. The tract begins on a beech on the east side of the creek. The line then crosses to the west side of the creek and to the top of a ridge and with the top of the ridge approximately parallel with and up the creek in a southerly direction to the head of "New Ground Hollow." It then runs down "New Ground Hollow" to the creek; and, on reaching the creek, runs down the creek a short distance to a point opposite a peach tree standing in the lower end of a bottom. From thence it proceeds up the hill on the east side of the creek to the top thereof. Then come the disputed calls, which are as follows: "And with the top of the hill, down the creek to a point opposite the beech first above named; thence a straight line to the beech, the place of beginning."

The place called for as the "top of the hill" and the "beech," the beginning corner, are both on the east side of Buffalo Creek, and some seventeen hundred feet apart. Approximately equi-distant between them a tributary known as Dave Branch empties into Buffalo Creek from the east. This branch has its source a mile or so to the east of its mouth. The plaintiffs contend that the call "with the top of the hill down the creek to a point opposite the beech" should be located by running with the top of the hill down the creek as far as the top of the hill continues in that direction, and from that point a straight line should be run to the beech, which line crosses Dave Branch near its mouth.

The defendants contend that the call "with the top of the hill down the creek to a point opposite the beech" should be located by following the ridge a couple of miles up the south side of Dave Branch and around its head and back down the ridge on the north side of the branch to a point on top of the hill near the beech, thereby including within the deed to their father, Calvin Clark, the lands on Dave Branch sought to be partitioned by the plaintiffs.

Edmond Clark, who was administrator of his father's estate, and who as such gave up this particular tract of land to be sold in the action heretofore mentioned, testified in substance that the line as located at that time was that now contended for by the plaintiffs in this action.

Indeed, it seems to us reasonable that if it had been intended to include within the sale and conveyance to Calvin Clark the land on Dave Branch owned by Hiram G. Clark, we would find in that deed some more apt expression of an intention that the line should run a mile or so up one side of the branch, around its head, and back down the ridge on the other side of the branch. In point of fact, if the true location of the line is as the defendants contended, there would be included in the boundary a tract of land in Pike county (which adjoins Floyd), which is admittedly not the property of any of the parties to this action, Dave Branch having its source in Pike county.

Unaided by satisfactory proof of contemporary marking of the lines of the commissioner's deed to Calvin Clark, or by satisfactory proof of actual possession sufficient to constitute a practical location by the parties, or potential with elements of estoppel, or of recognition and acquiescence, the question of the true interpretation of the calls in question is not without difficulties of solution. We are disposed, however, to agree with the conclusion reached by the chancellor, i. e., that the true line is that contended for by the plaintiffs, and not that running around the head of the Dave Branch, contended for by defendants.

2. Appellants contend that the petition recites that two of the defendants (appellants) are infants; and that as no defense was made for them by guardian or guardian ad litem, the judgment should be reversed.

The answer filed by the defendants, however, denies that each or either of the defendants is under the age of twenty-one years. We assume that the defendants knew their own ages, and that plaintiffs conceded this. There is no evidence in the record on this question; and we do not think the appellants are in position to complain in regard to it.

3. Appellants also contend that the affirmative matter in their answer was not traversed, and that with the pleadings in that condition it was error to render judgment for the plaintiffs. The record at page 137 contains an agreed order traversing all the undenied affirmative matter in any of the pleadings.

4. Appellants contend that plaintiffs produced no title papers as required by Sub-section 1 of Section 499, Civil Code of Practice. The appellants entered a motion for a rule against the plaintiffs to require them to file the title papers, but later withdrew this motion, and themselves filed the record in the suit of Hiram G. Clark's Admr. v. Hiram G. Clark's Heirs and Creditors, in which suit the Hiram G. Clark title papers were filed under which all the parties claim. Plaintiffs were not required to go beyond the common source of title. *Kidd v. Bell*, 122 S. W., 232; *Heard v. Cherry*, 92 S. W., 551, 29 R., 106.

5. We shall dwell but briefly upon the claim of the appellants that adverse possession of the lands on Dave Branch by Calvin Clark and themselves ripened into title to the exclusion of their tenants in common.

It may be said by appellants that, owing to the interpretation placed by them upon the disputed calls in the commissioner's deed to Calvin Clark, they claiming that it covered the land here in controversy, their claim to the extent of the calls in the deed was one under color of title; but the court having properly adjudged that the deed does not cover the land in controversy, their claim under color of title was confined to the boundary described in the deed; so that Calvin Clark and the defendants, his heirs-at-law, were but tenants in common with the other heirs-at-law of Hiram G. Clark, deceased.

One tenant in common may hold adversely to the others, but the statute will not begin to run until notice of such adverse holding is given or brought home to the tenants in common not in possession. *Middleton v.*

Fields, 142 Ky., 352, 134 S. W., 180; Bush v. Fitzgerald, 125 S. W., 716; Kidd v. Bell, 122 S. W., 232; Hamilton v. Steele, 117 S. W., 378; Vermillion v. Nickell, 114 S. W., 270. The evidence here does not disclose the requisite notice.

6. On October 15, 1913, the defendants entered a motion to abate the action as to two of the plaintiffs, Edmond Clark and Addison Clark, upon the ground that these plaintiffs had died pending the action and more than two years prior to the entering of the motion, without revivor being had, filing their affidavit in support of said motion. There was no ruling upon this motion, and the cause proceeded to judgment as if no suggestion had been made of the death of these two plaintiffs. Appellants now contend that because of the death of two of the plaintiffs without revivor, the judgment is void in its entirety. We cannot agree with this contention. The plaintiffs and defendants were tenants in common, and any one or more of the plaintiffs had a right to prosecute an action against their co-tenants, the defendants, who were asserting an adverse and sole ownership of the common estate. *Young v. Adams*, 14 B. M., 102, 58 Am. Dec., 654. So that, conceding that portion of the judgment which adjudges to Edmond Clark and to Addison Clark each an undivided one-tenth interest in the lands sought to be divided herein, is invalid as to those claiming under them, because of their death pending the action, without revivor, still the defendants were adjudged to be the owners of an undivided one-tenth interest, and that being all they were entitled to, they have no valid complaint of the judgment in that respect.

Their own affidavit shows that both Addison Clark and Edmond Clark died intestate, leaving children, so that the appellants could not have inherited any interest from the deceased plaintiffs so as to have increased their interest beyond the one-tenth adjudged to them.

7. It will have been seen that this proceeding has two phases in that, although it was originally instituted as an action for partition, it became, when the answer of defendants was filed, denying the plaintiff's ownership and asserting ownership in themselves, converted into an action in ejectment wherein the plaintiffs each sought to recover of the defendants their several respective undivided interests in the land in controversy;

after the adjudication of which controversy the plaintiffs having prevailed, the action again became one for partition among tenants in common.

The question of the death of Addison Clark and Edmond Clark, pending the action, and without revivor, in so far as it affects the proceedings in partition, therefore, presents itself for solution.

A valid partition may not be had unless all the tenants in common have been subjected to the jurisdiction of the court rendering the decree. *Borah v. Archer*, 7 Dana, 176; *Hunter v. Brown*, 7 B. M., 283; *Girty v. Logan*, 6 Bush, 8; 30 Cyc., 201. And this rule applies whether the partition proceedings be brought in equity or by ordinary action as permitted by Section 499, Civil Code.

It is true that a division made, may be thereafter accepted and ratified by tenants in common who were not before the court when the partition was effected, thereby validating the proceedings had. This was done in *Blue v. Waters*, 114 Ky., 659.

But the heirs-at-law of the deceased plaintiffs, Edmond Clark and Addison Clark, may not care to follow the procedure in that case, and appellants are entitled to have in this proceeding a title not subject to the possibility of the entire partition being opened up by parties who were not before the court at the time it was effected.

In so far as the judgment appealed from orders the partition of the land in question, it is reversed, with directions to have made parties the heirs-at-law of Addison Clark and Edmond Clark before effecting the partition sought.

The judgment of the lower court denying the claim of appellants to be the sole owners of the land in controversy is affirmed.

The appellants will be required to pay one-half of the costs of this appeal and their pro rata share of the other half thereof.

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### **Adams Express Company v. Cook, et al.**

(Decided February 9, 1915.)

Appeal from Shelby Circuit Court.

1. Carriers—Interstate Commerce—Contracts—Burden of Proof.—If an interstate carrier relies upon a contract which limits lia-

bility, the burden of proof is upon it to show that it has complied with the federal law by filing a graduated schedule of rates with the Interstate Commerce Commission, or else that the contract is just and reasonable, and that the shipper declared a value on the shipment in order to secure the lesser of two freight rates.

2. Carriers—Contracts—Notice—Pleading.—If the carrier pleads in bar a clause of the contract requiring the shipper to give 30 days' written notice of loss or damage, good pleading demands that it deny that notice was given, but such denial does not carry with it the burden of proving the negative. The shipper cannot recover unless he gave the notice and he must plead and prove that he did.

JOS. S. GRAYDON, LAWRENCE MAXWELL and WILLIS, TODD & BOND for appellant.

BEARD & PICKETT for appellees.

#### OPINION OF THE COURT BY JUDGE NUNN—Reversing.

Appellee Cook recovered judgment against the express company for \$1,500 damages, the full amount claimed in his petition. The action was to recover for alleged injury to horses caused by delay in moving them to destination and negligence of appellant's servants in caring for them while in transit. The shipment was a carload of horses billed from Shelbyville, Kentucky, to Boston, Massachusetts, and was made upon a written contract. The petition was a simple one to recover damages for breach of this contract, and sought to recover the whole loss. From the petition it appeared that the writing was in possession of the company. The company answered, admitting the contract and filed it as an exhibit. Besides controverting the negligence and damage, it averred that it was a common carrier engaged in interstate commerce, and that the shipment in question was interstate, and that the contract limited liability for loss or damage to \$100 for each horse, that being the value of each as declared by Cook; that it was in consideration of such declared value and liability so limited that the company agreed to carry at the rate stipulated, which was less than the rate charged for carrying horses of a greater value. It also plead and relied upon a clause in the contract absolving it from liability unless written notice of claim for loss or damage be given within thirty days after the loss or damage occurred. It was further alleged that Cook had failed

to give such notice within that time. It alleged that it had a right to make a contract limiting liability, and that it was binding on both the carrier and shipper, because it had prior thereto, as required by the Act of Congress and the rules and regulations of the Interstate Commerce Commission, posted and filed a tariff or schedule of rates between the points in question, showing a scale of rates graduated according to value of horses shipped, and that, in order to obtain a lesser rate, Cook declared the value named and agreed to limit liability for loss to that extent.

Cook, by reply, admitted the contract and interstate character of the shipment, but controverted every other allegation of the answer, even the negative averment that he had not given written notice of the loss within thirty days. Then he plead affirmatively that he did give the notice, showing the manner of it, and in effect claiming that the facts which he alleged made the notice equivalent to a written notice. He especially denied that the appellant had any system of rates graduated according to value between Shelbyville and Boston, or that he declared any value on the horses, or that he had any choice of rates, or was given the opportunity of election between rates, or that he elected to ship at the alleged lowest rate applicable to a valuation of \$100 per head.

With the issues thus joined the appellant introduced no proof to show that it had filed with the Interstate Commerce Commission, or posted, or maintained any tariffs or schedule of rates graduated or otherwise. Nor did Cook offer any evidence to show that he had given any notice of the claim for loss or damage. There was absolutely no proof offered by either party in regard to notice or graduated tariffs. Under these circumstances the court in instructing the jury ignored both propositions. In substance the jury were told that if they believed from the evidence that the horses were injured by the negligence of appellant or its servants, they should find for Cook such damage as he sustained by reason thereof, not exceeding \$1,500, the amount claimed in the petition.

Appellant asked for a peremptory instruction, because there was no proof of notice, and, therefore, it claimed that under the contract Cook had not shown himself entitled to recover. The peremptory instruction



being refused, the court was asked to instruct the jury to limit recovery to \$100 on each animal injured. As above indicated, this was also refused.

It was the view of the lower court that when the appellant failed to show that it had conformed to the interstate commerce law by filing its schedule of graduated rates with, and getting the approval of, the Interstate Commerce Commission, it, therefore, did not establish a right to make a contract limiting its common law liability as to the amount of damages recoverable, or a right to require notice of loss. In other words, the lower court held that, in the absence of such proof by appellant, the provisions of Section 196, Kentucky Constitution, were applicable and controlling in this case. Prior to the enactment of the interstate commerce law it was held in this State that such stipulations were in violation of Section 196 of the Constitution, which provides that no common carrier shall be permitted to contract for relief from its common law liability. *O. & M. Ry. Co. v. Tabor*, 98 Ky., 503; *Brown v. I. C. R. R. Co.*, 100 Ky., 525.

But the Hepburn law and the Carmack amendment of 1906 manifest a purpose on the part of Congress, as has been frequently held by the United States Supreme Court, to take exclusive control of interstate commerce, including the liability of a common carrier for loss or damage to an interstate shipment, and to supersede all State legislation upon the same subject, including provisions of State constitutions, or laws invalidating contracts limiting the carrier's liability to agreed values. *Adams Express Co. v. Croninger*, 226 U. S., 491, 44 L. R. A. (N. S.), 257; *K. C. So. Ry. Co. v. Carl*, 227 U. S., 652; *M. K. & T. v. Harriman*, 227 U. S., 669; *C. B. & Q. Ry. v. Miller*, 226 U. S., 517; *C. St. P. M. & O. Railroad v. Latta*, 226 U. S., 519; *L. & N. v. Miller*, 156 Ky., 677; *Robinson v. L. & N.*, 160 Ky., 235; *Howard & Callahan v. I. C.*, 161 Ky., 783.

We quote from the Croninger case with reference to the Acts of Congress referred to:

"That the legislation supersedes all the regulations and policies of the particular States upon the same subject results from its general character \* \* \* almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede

all State regulations with reference to it. Only the silence of Congress authorized the exercise of the police powers of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

It appears, therefore, that the Federal law is now the whole law regulating and controlling interstate shipments. It was enacted without condition or reservation, and its force and scope is not dependent upon acceptance of its terms by carrier or shipper. The law makes it their duty to comply with it. It is not within the power of either the shipper or carrier, by contract or otherwise, to choose between the application of the State and Federal laws. Intrastate shipments are governed by the law of the State, but as to interstate shipments the Federal law only applies, because it is self-operative, and has superseded all State law in that regard. The character of the shipment, that is, whether it is state or interstate, determines the question as to which law is applicable. *St. L. S. F. & T. Ry. v. Seale*, 229 U. S., 156; *Pederson v. D. L. & W. R. R.*, 227 U. S., 146

Therefore, in an interstate shipment the validity of any stipulation in a contract which undertakes to limit the carrier's liability is a Federal question to be determined both by the State and Federal courts under the common law as finally declared by the United States Supreme Court *L. & N. v. Miller*, 156 Ky., 677.

In applying to this case the common law as declared by the United States Supreme Court, the first question that arises under the pleadings and proof, is the validity of that clause of the contract limiting liability to \$100 per head.

Section 6 of the Interstate Commerce Act makes it the duty of every common carrier engaged in interstate commerce to file with the commission, and to print and keep open to public inspection, a schedule showing all rates, fares and charges between the different points on its own route. It is admitted by the pleadings that the appellant is engaged in interstate commerce between Shelbyville and Boston, the points named in the contract of shipment. But, as already stated, it introduced no proof to show that it had filed with the commission, or had printed or kept open to public inspection any

schedule of rates. Failing to comply with the law in that regard, and there being an entire absence of proof to show that the shipper had any choice of rates, or that the carrier offered him any inducement to secure or in anywise compensated him for an agreement limiting liability for loss or damage, can it be said that the contract which it offers in this case limiting liability is binding or enforceable under the common law as declared by the United States Supreme Court? The Federal rule with reference to such contracts is thus stated in the Croninger case:

“That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall, 107, 18 L. Ed., 170; *New York C. R. Co. v. Lockwood*, 17 Wall, 357, 21 L. Ed., 627; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S., 174, 23 L. Ed., 872; *Hart v. Pennsylvania R. Co.*, 112 U. S., 331, 338, 28 L. Ed., 717, 720, 5 Sup. Ct. Rep., 151. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be mollified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servant. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

“It has, therefore, become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.”

Applying these principles to the case at bar, we have a simple question of fact, and that is, was the contract limiting the amount of recovery a fair, open, just, and reasonable agreement, made for the purpose of obtain-

ing the lower of two or more rates of charges proportioned to the amount of the risk? The appellant, in substance, set up the facts about filing schedules, choice of rates, declared value, etc., tending to show that the contract was fair and reasonable. The reply of appellee denies the facts. The burden of proof was, therefore, upon appellant, and failing to offer any proof to sustain its position, it was, therefore, liable for the whole loss and damage due to its own negligence, or that of its servants. Had appellant proved that it filed the schedule of graduated rates with the Interstate Commerce Commission, as required by law, then the burden of proof on this proposition would have been different. But, until it establishes the filing of such rates, the burden is on it to show the fairness and reasonableness of the contract for interstate shipment, if it attempts to limit liability on graduated rates. When the fact of filing is established, the shipper is compelled to take notice of the rates contained in the tariff schedule, "not only because referred to in the contract signed by them, but because they had been lawfully filed and published." *M. K. & T. Ry. v. Harriman*, 227 U. S., 669.

When the carrier graduates its rates by value, and has filed its tariffs showing the rates applicable to a particular commodity or article of commerce, based upon a difference in valuation, the shipper must take notice for the valuation, as said in the *Harriman* case, "automatically determines which of the rates is the lawful rate." This doctrine was again set forth in the case of *A. T. & S. F. Railroad v. Robinson*, 233 U. S., 173, in the following language:

"We regard these cases as settling the proposition that the shipper, as well as the carrier, is bound to take notice of the filed tariff rates, and that so long as they remain operative, they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing."

The cases referred to in the above quotation are *Carl and Harriman*, *supra*. See also *Robinson v. L. & N.*, 160 Ky., 235.

If the carrier has filed its schedule of rates, as required by law, then, as we understand from the Supreme Court opinions, both the shipper and carrier are concluded by the provisions of a contract made thereunder.

If the schedule has not been so filed and published, as appears to be the case from the record, then the reasonableness of the contract becomes a question of fact, and depends upon whether the value was declared for the purpose of obtaining a lower of two or more rates proportioned to the amount of risk. An issue was made on these facts by the pleadings, with the affirmative, and, therefore, the burden of proof on appellant, and failing to offer any proof, the lower court very properly, as we believe, refused to give an instruction telling the jury to limit recovery according to the terms of the contract.

But on the question of notice we are of opinion that the lower court erred. This question is not affected by the filing or not filing schedule of rates with the Interstate Commerce Commission. The matter of notice is a subject which need not be brought to the attention of the commission in any way—that is, the law does not require it.

In the recent case of *Howard & Callahan v. I. C. R. R. Co.*, 161 Ky., 783, this court had under consideration the reasonableness of a notice requirement in a contract for interstate shipment, and reviewed all the Federal authorities on the subject. It was held that such a requirement was reasonable. In the case at bar, the appellant set up the contract containing a notice requirement, and denied that the shipper had given such notice. The shipper replied, pleading affirmatively that it did give the notice. We have then a *prima facie* case for the carrier. For, in the absence of proof showing notice, the carrier would prevail on the pleadings. It was incumbent upon the shipper to support his plea of notice by proof that he did give the notice. The appellant set up the contract and the obligation on the part of the shipper to give the notice as a pre-requisite to a right of recovery. Good pleading required of it also a denial that notice had been given, but, under the rules of practice in this State, such denial did not put upon it the burden of proof to establish that negative. For instance, in a suit upon a promissory note the pleader not only claims upon the promise to pay, but avers that the note has never been paid, but no issue is joined on payment if the defendant merely denies that the note has never been paid. If he relies upon payment, he must affirmatively plead it by answer. Notice, like payment, is one of the disputable presumptions of law, which must

be negatived in the pleading of the party claiming the right, because there is a presumption that the obligor has done that which he promised, viz., paid the note or given the notice. But in such a case the pleader does not take the burden of proof. Newman on Pleadings and Practice, Section 214.

As is said in Section 124d of the same work:

"So, also, payment \* \* \* must be relied on in the answer as new matter, and cannot be given in evidence under an issue formed by a denial of the allegations of the petition." Bentley v. Bustard, 16 B. Mon., 675.

We have reached the conclusion that Cook, the shipper, should have supported his plea of notice by proof, and failing to do so he was not entitled to recover under the contract. Therefore, the lower court erred in refusing to so instruct the jury.

The judgment is reversed, with direction for a new trial in conformity with this opinion.

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### War Fork Land Company v. Spivey, et al.

(Decided February 9, 1915.)

#### Appeal from Jackson Circuit Court.

1. Ejectment—Possession—Title.—Under the Code, it is sufficient in a suit in ejectment for the plaintiffs to allege that they are the owners and entitled to possession of the land described. It is not necessary to allege and show how title was derived. This should come in the evidence to support the allegation of ownership.
2. Ejectment—Adverse Possession.—In a suit in ejectment the plaintiff must recover, if at all, upon the strength of his own title and not the weakness of his adversary's, but when the defendant admits that the title was once in plaintiff, the burden shifts, and it is then upon him to show that the plaintiff has been divested of title by subsequent conveyance or by adverse possession.
3. Ejectment—Title.—When the plaintiff in ejectment shows a title prima facie valid, it then devolves upon the defendant to show a superior adverse title.

T. E. MOORE, JR., for appellant.

A. W. BAKER for appellees.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

This is an action in equity by the heirs-at-law of Mary Polly Spivey for a cancellation of certain deeds in appellant's chain of title, and also praying to be adjudged the owners and entitled to the possession of the 155 acres of land in controversy. Judgment of the lower court granted to the heirs-at-law the relief prayed for, and the land company appeals.

Appellant says, and we think correctly, that, although this action was in equity, it is in the nature of ejectment and the question is one of title. Therefore, the sufficiency of the pleadings and proof is tested by the rules of practice applicable to actions at law in ejectment.

To explain the controversy, we give the facts as they appear in the pleadings. Julius Spivey and Mary Polly Spivey were husband and wife, and the appellees are the only issue and heirs-at-law of that union. On March 12th, 1888, Julius Spivey "had and owned and held the fee simple title" to the land. On that date Mrs. Spivey sued for divorce on the ground that her husband had abandoned her and was living in adultery with another woman. The divorce suit described the land which is now in controversy, and prayed for certain equitable relief in regard to it for the support of herself and children. In November following the court adjudged her the use, possession, and control of the land during her lifetime. October 1, 1889, while the divorce action was still pending, Julius Spivey executed a deed conveying the land to her with covenant of general warranty. A year later, that is, in October, 1890, a decree of absolute divorce was entered. It appears that on the 14th day of October, 1889, fourteen days after she received the conveyance from her husband, but nearly a year before the judgment of divorce, Mary Spivey executed and delivered a deed conveying the land to Preston Isaacs. Her husband did not join in this deed. The petition sets out with particularity the relationship of the appellees, and their chain of title. Record reference is made to all the deeds in their chain of title, as well as to those from Preston Isaacs down to the appellant land company, under which it is said the land company claims. It is averred, however, that all the deeds in the Preston Isaacs chain are void because of the fact that Mary Spivey, when she conveyed to Preston Isaacs had a living husband, and he did not join in the deed. They say that the conveyance of the land to Preston Isaacs

was the only conveyance or attempted conveyance which their mother ever made, and that she was, therefore, the owner of it at the time of her death in 1900. They then aver that they are the owners of the land as her heirs-at-law. The answer of the land company made the following denials: That the plaintiffs (appellees) were the heirs of Mary Polly Spivey; that the Preston Isaacs deed was of a date prior to the divorce; that Mary Polly Spivey owned the land at the time of her death. Appellant admitted it claimed ownership and possession, and justified the claim with allegation of open and continuous adverse possession for more than 15 years.

Testimony for the plaintiffs established the fact that they were the only heirs-at-law of Mary Polly Spivey, and also put in evidence all of the deeds referred to. The land company took no proof. By brief we are informed that the land company was deprived of this privilege through mistake of its attorney as to term time of the Jackson Circuit Court. He was not aware that an act of the legislature had amended the Kentucky Statutes to change the time of court from the third Monday in April to the fourth Monday in March. He resides in another county and going to Jackson county to take depositions preparatory to trial at the April term, he ascertained that judgment had already been rendered against his client. But this is not a proceeding for a new trial under code provisions, and appellant does not urge these facts on this appeal as a reason for reversal. Nor does he attempt to uphold the validity of the deed from Mary Polly Spivey to Preston Isaacs. In fact, he concedes that she was a married woman at the time, and that the deed is void because her husband did not join in it. But he calls attention to the fact that there is no specific allegation that Julius Spivey owned the land on the 1st day of October, 1889, when he conveyed to his wife, Mary Polly Spivey. There is no denial that Julius Spivey owned the land on March 12th, 1888, when his wife sued for divorce. But appellant contends it does not follow that his ownership continued until October, 1889, when he conveyed to his wife, and he argues that since there was no proof other than the deeds mentioned to establish ownership, the judgment was erroneous. He relies upon the cases of *Jones v. Griffin*, 25 Ky. L. R., 117; *Howard v. Lock*, 15 Ky. L. R., 154; *Howard v. Singleton*, 94 Ky., 336; *Anderson v. Turner*, 3 A. K. Mar., 134; *Doe v. Dupey*, 4 J. J. Mar., 338.



These cases arise by title from demise or descent, and recognize the familiar rule that in a suit by heirs-at-law in ejectment, when their title is put in issue, it is incumbent upon them to show ownership in their ancestor at the time of his death. This is one way of applying the general rule that in ejectment, where the title of the plaintiff is denied, he must recover, if at all, upon the strength and sufficiency of his own title and not the weakness of his adversary. But these appellants do not claim title as heirs-at-law of Julius Spivey. They claim as heirs of Mary Spivey, to whom Julius Spivey conveyed.

We are impressed that the pleadings and proof in this case meet all requirements, and, in fact, the petition covers a great deal more ground than is necessary. Under the Code, it is sufficient for the plaintiffs to allege that they are the owners and entitled to possession of the land described. It is not necessary to outline the chain of title. This should come by way of evidence to support the allegation of ownership. *L. & N. v. Taylor*, 138 Ky., 437; *Asher v. Howard*, 122 Ky., 175.

But when plaintiffs set up their chain of title and some of the links are attacked by the answer, the others stand admitted. It, therefore, appears that on March 12th, 1888, when the divorce proceeding was instituted, Julius Spivey was the owner of the land. Appellant's position is that no presumption arises from the fact of ownership at that time—that his ownership continued for another year and a half, that is, until October, 1889, when he conveyed to his wife. But, in our opinion, this position is not well taken. When the defendant admits that the title was once in plaintiff's grantor the burden shifts, and it is then upon him to show that the grantor was divested of title by subsequent conveyance or by adverse possession. *Thomas v. Thomas*, 93 Ky., 435.

When the plaintiff shows a title, *prima facie* valid, it then devolves upon the defendant to show a superior adverse title.

It follows from these conclusions that the heirs-at-law made out a *prima facie* case. Appellant's case was a plea of adverse possession, and there being no proof to sustain it, the court very properly adjudged title and right of possession in the heirs-at-law, the appellees here.

The judgment is, therefore, affirmed.

**Letcher County v. Town of Whitesburg.**

(Decided February 9, 1915.)

**Appeal from Letcher Circuit Court.**

**Municipal Corporations—Roads—Street—Duty of Town to Maintain as Street County Road in Town Limits.**—Where a county road is taken into a town by the extension of the town limits or the creation of the town, it becomes one of the public ways of the town and it is the duty of the town to maintain it as a street as long as it is kept open by the town as a public way. If the town desires to relieve itself of the obligation to maintain this public way as a street it may by appropriate action reduce the town limits and thereby recommit to the care of the county as one of the public roads so much of it as lies outside the town limits; or it may be closed as a public way of the town unless it is necessary to enable the people of the county to go to and from the public buildings of the county situated in the town.

W. H. BLAIR and JAS. H. NEWMAN for appellant.

D. D. FIELDS and J. J. WAKEFIELD for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

This is an agreed case between the town of Whitesburg, in Letcher county, and Letcher county, for the purpose of having determined which of these municipalities shall maintain a public road within the corporate limits of the town of Whitesburg.

It appears from the agreed state of facts that the road in controversy, while located within the corporate limits of the town, does not traverse any part of the town occupied by buildings, but lies between the town limits and that part of the town in which all of the residences and other buildings are situated. This fact, however, we do not regard as at all material in determining whose duty it is to maintain this road in reasonable repair. That the road in question is within the corporate limits of the town is sufficient to put the duty of keeping it in repair on the town so long as it is kept open as one of the public ways of the town. In other words, it occupies the position of one of the streets of the town as much so as if it were located in the business part of the town.

If the limits of the town are too large for the business and population of the town and the authorities want to relieve themselves of the obligation to keep

this road, which now may be called a street, in repair, they may, by appropriate action, reduce the town limits and thereby place as much as they desire of this street outside the town limits, thus recommitting it to the care of the county as one of its public roads, or it may be closed as a public way of the town unless it is necessary to enable the people of the county to go to and from the public buildings of the county that are situated in the town.

We think this case is controlled by the opinion of this court in Board of Council of Danville v. Fiscal Court of Boyle County, 106 Ky., 608, and by the opinion in Nelson County v. City of Bardstown, 124 Ky., 636.

Wherefore, the judgment, holding that it was the duty of the county to maintain this road, is reversed, with directions to enter a judgment in conformity with this opinion.

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### **Gernert, et al. v. Straeffer's Executor, et al.**

(Decided February 9, 1915.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Fourth Division).

1. Wills—Contest—Preliminary Proof for Propounders—Burden of Proof.—When the propounders of a will have proven the due execution of a paper not irrational in its provisions nor inconsistent in its structure, language or details with the sanity of the testator, they may rest their case without introducing any evidence as to the soundness of mind of the testator; but if the will is so irrational or inconsistent as to be incompatible with soundness of mind, the introduction of some evidence of mental capacity is necessary in the preliminary proof for the propounders.
2. Wills—Contest—Burden of Proof—Introduction of Evidence.—When the propounders have shown the statutory execution of the paper and also the soundness of mind of the testator, when the appearance of the paper makes necessary evidence of this character, they may rest their case and the burden of proving that the testator was of unsound mind when he executed the paper, or that its execution was procured by undue influence, shifts to the contestants, and after they have concluded their evidence the propounders may introduce further evidence in contradiction or rebuttal of the evidence offered by the contestants.
3. Wills—Contest—Instruction as to Execution of Paper.—An instruction telling the jury that they should find the paper to be the will unless they believed that when it was "signed" by the testator he was of unsound mind or under undue influence, was not

prejudicial in this case; but it is better practice to use the word "executed" in place of the word "signed."

4. **Wills—Contest—Evidence.**—In a will contest it was not error to exclude evidence tending to show a parol agreement by which the testator promised to give to the contestants certain property, when it appeared that subsequent to this parol arrangement a deed was made conveying to him the property without any limitations or restrictions.
5. **Verdict—Right of Court to Make or Direct Correction of Defective.**—It is usual and proper when a jury has returned a verdict that is merely defective in form for the court to send them back to their room so that they may correct it, or the judge may, if the verdict is a substantial response to the issues, correct informalities in it.

R. C. KINKEAD for appellants.

J. M. CHILTON and THOS. J. KNIGHT for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

This is a will contest prosecuted by the four appellants, daughters of George Straeffer, deceased, for the purpose of having it adjudged that a paper probated in the Jefferson County Court was not in fact his last will. On the appeal from the county court to the circuit court there was a trial, which resulted in a verdict and judgment sustaining the will, and the contestants are here as appellants asking a reversal of that judgment.

George Straeffer, who, according to all the testimony, was a very excellent man, was twice married. His first wife died in 1895, leaving surviving her six children born of the marriage with George Straeffer. Two of these children, on account of some property arrangement between themselves and their father, had no interest in the estate left by him at his death, and are not parties to this contest. In 1901 Straeffer married the second time, and died in the latter part of 1912, leaving surviving him his second wife and the six children of his first wife.

It appears that in 1905 George Straeffer made a will, in which he gave to his wife his house and lot situated on Bonnycastle avenue, together with all of the furniture therein, and also all money that he might have after the payment of his debts. To his four daughters he gave the other real estate owned by him, which consisted of a house and lot on Cherokee Drive, with directions that this property should be sold and the proceeds be divided between his daughters.

In 1910 he made a codicil, in which he directed that his wife should have the rent of the house on Cherokee Drive until it was sold, and also \$500 out of the proceeds of its sale. On November 18, 1912, he made another codicil, in which, after reciting that he had sold the property on Cherokee Drive, he gave to three of his daughters, who were married, \$100 each, and to his unmarried daughter \$300. All the remainder of his property, real and personal, he gave to his wife.

At the time of his death he owned the house and lot on Bonnycastle avenue, worth about \$3,200, and some \$3,300 in personal estate, subject, of course, to the payment of funeral expenses, cost of administration, and the \$600 devised to his daughters.

It appears that some time previous to his death, and after selling the Cherokee Drive property, he gave to his wife \$2,100 out of the proceeds of this property. So that the amount of estate she received from him in the way of this gift and under his will amounts to something over eight thousand dollars.

The contest was directed to the codicil made in November, 1912, and this was attacked on the grounds that it was procured by the undue influence of his wife, and that the testator was mentally incapable of making at that time a disposition of his property. It is not seriously insisted by counsel for the contestants that there was not sufficient evidence to sustain the finding of the jury that the testator was capable of making this codicil and was not unduly influenced in its execution, but it is earnestly insisted that, on account of errors of law committed by the trial court, the judgment should be reversed.

The first error assigned is the failure of the trial court to sustain a motion for a peremptory instruction after the propounders of the will had rested on their preliminary evidence. It appears that the propounders, after introducing the will and proving its execution in accordance with the statute, rested without offering any evidence showing the mental condition of the testator at the time the will was executed, and it is the contention of counsel for the contestants that the preliminary burden of proof was on the propounders, not only to show the due execution of the paper, but the soundness of mind of the testator at the time he executed it.

In *Milton v. Hunter*, 13 Bush, 163, the court, in considering this exact question, said:

“When the propounders of a will have proven the due execution of a paper not irrational in its provisions nor inconsistent in its structure, language, or details with the sanity of the testator, the presumption of law makes out for them a *prima facie* case, and the burden of showing that the testator was not in fact of sound and disposing mind and memory at the time of the execution of the will is shifted upon the contestants. \* \* \* The propounders may, if they see proper, rest their case on the statutory proof of due execution, and, if the will be rational, and the contestants introduce no proof tending to rebut the presumption of sanity on the part of the testator, the issue raised on this question by the law will usually be decided in their favor. It is usual and proper to interrogate the subscribing witnesses on this subject, and while this may be done without subjecting the propounders to the necessity of introducing all their proof in advance of an attack by the contestants, it is not absolutely essential in all cases; and when there is no proof on the question of sanity, or where the evidence leaves that question in doubt, the jury may resolve that doubt by acting on the legal presumption.”

This practice was followed and approved in *Flood v. Pragoff*, 79 Ky., 607; *Fee v. Taylor*, 83 Ky., 259; *Woodford v. Buckner*, 111 Ky., 241; *Bottom v. Bottom*, 32 Ky. L. R., 494; *Henning v. Stevenson*, 118 Ky., 319; *Watson v. Watson*, 137 Ky., 25, and perhaps other cases. So that it may now be regarded as a closed question that when the propounders have proven the statutory execution of the will they may rest their case without then offering any evidence of the soundness of mind of the testator at the time he executed the paper, unless it be that the paper, on its face, shows that it is so irrational, or its provisions so inconsistent, or its structure, language or details so incompatible with soundness of mind, as to make necessary the introduction of some evidence of mental capacity. When a paper of this character is offered by the propounders they should, in addition to proving its statutory execution, introduce some evidence of the soundness of mind of the testator at the time of its execution.

The propounders may, however, if they desire, introduce preliminary evidence of the soundness of mind of the testator, although this is not necessary except

when the will itself falls within the description above referred to. When the propounders have shown the statutory execution of the paper, and also the soundness of mind of the testator when the appearance of the paper makes necessary evidence of this character, they may then rest their case, and the burden of proving that the testator was of unsound mind when he executed the paper, or that its execution was procured by undue influence, shifts to the contestants, and they must then introduce their evidence, and after they have concluded their evidence, the propounders may then introduce further evidence in rebuttal or contradiction of the evidence offered by the contestants.

It may here be observed that some confusion has crept into the practice as to the sufficiency of the preliminary proof by the propounders growing out of a reference in *Bramel v. Bramel*, 101 Ky., 64, to a statement in *Johnson v. Stivers*, 95 Ky., 128. In the *Johnson* case the court said: "The burden was on the propounders to show, by a preponderance of evidence, that the testatrix was of testamentary capacity, and on the contestants to show, by a preponderance of testimony, that she was unduly influenced or coerced, as defined in other instructions." In the *Bramel* case, in speaking of this language in the *Johnson* case, the court said "that the statement that the burden as to testamentary capacity was on the propounders, referred to the establishment of a *prima facie* case." But this expression in the opinion was evidently inadvertently made, as the practice, both before and since the decisions in *Johnson v. Stivers* and *Bramel v. Bramel*, has been as indicated in the cases before referred to. The will here in question not being irrational in its provisions, or inconsistent in its structure, language or details with the sanity of the testator, the propounders, in their preliminary proof, had the right to rest their case upon the introduction of evidence showing the statutory execution of the paper.

Another assigned error is that in the instructions the court told the jury that they should find the paper dated November 18, 1912, to be the will of George Straeffer, Sr., unless they believed from the evidence that "the codicil dated November 18, 1912, was signed when said George Straeffer, Sr., was under undue influence of some other person, as defined in instruction

number six, or it was signed when he was not of sound mind, as defined in instruction number five."

The objection to this instruction is that it uses the word "signed" when, as said by counsel, the word "executed" or the words "attested by the witnesses" should have been used in place of the word "signed." The uncontradicted evidence shows that the will was written in the presence of the testator, and was signed by him a few minutes after it was written, and his signature acknowledged by him in the presence of witnesses within an hour after it was made, and that it was attested by the witnesses at the time of its acknowledgment by the testator in their presence. So that the writing of the paper, the signing by the testator and the attesting by the witnesses may be treated as one act, and, therefore, in no event could the use of the word "signed" in this case have been misleading or improper.

Section 4828 of the Kentucky Statutes provides that: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

It will, therefore, be seen that when the paper is not wholly written by the testator his signature must be made or the will acknowledged by him in the presence of two witnesses, so that when the paper is not wholly written by the testator, the fact that he signs it is not sufficient to establish its execution as a will unless it be attested in the manner provided by the statute. In other words, a will is not executed unless the paper conforms to the statute, and, therefore, we think it the proper practice to use the word "executed" in place of the word "signed," and generally this is the practice adopted by the circuit judges of the State: Hobson, Blain & Caldwell on Instructions, Section 629.

Another error complained of is the action of the trial court in excluding from the jury evidence of a parol agreement claimed to have been entered into between George Straeffer and his children, shortly after the death of his first wife, at a time when there was a division of the real estate of his first wife between the husband and the children.



The evidence excluded was to the effect that, in consideration of the conveyance by the children to George Straeffer, he agreed that he would will to his four daughters the house and lot on Cherokee Drive, or give to them its value if he sold it. Subsequent to this alleged parol agreement, and for the purpose of settling the estate of their mother, all of the children, as well as George Straeffer, their father, joined in an *inter partes* deed conveying to each of them in fee simple, and without any attached agreement, certain described property, a part of which was this house and lot on Cherokee Drive. The trial court, in excluding the evidence referred to, ruled that the previous parol agreement between the parties was merged in the deed, and we do not think this ruling was error. Looking at the matter from another aspect, this alleged parol agreement was made so many years before the execution of the will in contest that it could not be said to have any controlling relevancy upon the issues involved in the will contest.

The last ground of reversal relied on is that the trial court committed error in advising the jury as to the form of their verdict. It appears from the record that the jury returned a verdict reading, "We, the following jurors, find for the defendant." When this verdict was returned, the court stated to the jury that it was not in proper form and they should return a verdict in conformity with the instructions, which advised them that if they believed under the evidence that the papers offered were the last will of George Straeffer, they should so find, or if they believed that the paper dated November 18, 1912, was not his last will, they should so return. We find no objection to this practice. The jury, in finding "for the defendant," did, in fact, find for the will, but did not in proper form express their verdict. It is usual and proper when a jury has returned a verdict that is merely defective in form for the court to send them back to their room so that they may correct it, or the judge may, if the verdict is a substantial response to the issues, correct informalities in it. *Tarlton v. Bricoe*, 1 A. K. Mar., 67; *Worford v. Isabel*, 1 Bibb., 247; *Crozier v. Gano*, 1 Bibb., 257; *Walter v. Louisville R. Co.*, 150 Ky., 652; *Louisville Water Co. v. Scholtz*, 140 Ky., 436.

The judgment is affirmed.

**Kelly, et al. v. Board Trustees Evarts Graded School.**

(Decided February 9, 1915.)

**Appeal from Harlan Circuit Court.**

1. Schools and School Districts—Establishment of Graded School District—Election—Advertisement—Hand Bills—Sufficiency.—Copies of a newspaper advertisement containing a county court order calling for an election to be held at a certain time and place for the establishment of a graded school district, and properly posted in five conspicuous places for the required time, constitute a substantial compliance with the statute requiring the display of hand bills advertising the election.
2. Schools and School Districts—Establishment of Graded School District—Election—Advertisement—Hand Bills—Not Posted by Sheriff.—Where notices of an election to establish a graded school district are posted as required by the statute, it is immaterial that the sheriff himself does not post them.
3. Schools and School Districts—Graded School District—Election—Petition—Description of Boundary Appended After Petition Filed—Effect.—Where in a petition for an election to establish a graded school district, the description of the proposed boundary and site for the school house were appended after the petition was filed, this fact did not vitiate the petition, where the effect of the appended descriptions was not to add to or take from the boundaries set out in the petition, but merely to describe with greater accuracy the boundaries contained in the petition.
4. Schools and School Districts—Graded School District—Petition—Approval by Trustee—Evidence.—Held under the evidence that a petition for the establishment of a graded school district was approved by the trustee of the subdistrict affected, in compliance with Section 4464 of the Kentucky Statutes.
5. Schools and School Districts—Graded School District—Election—Question Propounded to Voters.—In an election for the establishment of a graded school district, held, under the evidence, that the question "Are you for or against the graded common school tax?" was properly propounded to each of the voters.

J. S. FORESTER for appellants.

LEWIS & POPE and J. G. FORESTER for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiffs, W. B. Kelly and others, brought this action against the trustees of Evarts Common Graded School District to enjoin the collection of taxes on the ground that the district was not legally established.

The trial court denied them the relief sought, and they appeal.

It appears that on April 6, 1914, fourteen legal voters and taxpayers of the Evarts Common School District, Educational Division No. 2, Sub-district No. 3, of Harlan county, filed with the county judge a petition asking him to spread an order on his order book directing the sheriff to hold an election to establish a graded school district with the same boundary as the common school sub-district and with the same site for the school building. On the face of the petition is the following:

"We hereby approve of the petition herein to establish a graded school at Yocums Creek, this Mch. 28, 1914.

(Signed)

"W. L. BAILEY, Chairman,

"J. S. MCKNIGHT, Secty.,

"J. H. MIDDLETON, Trustee."

Appended to the petition is an accurate description of the site on which the school building was to be located, and an accurate description of the proposed graded school district. At the next regular term of the county court an order was entered directing the sheriff to cause an election to be held in said proposed district on Saturday, June 13, 1914, for the purpose of taking the sense of the legal white voters on the proposition whether or not they would vote an annual tax of twenty cents on each \$100 worth of property in said boundary belonging to the white voters or other white property-holders, and a poll tax of one dollar on each white male inhabitant in said proposed district over the age of twenty-one years, for the purpose of maintaining a graded school in said district, and for the purpose of erecting, purchasing and maintaining suitable buildings therefor. The order further provided that the sheriff should appoint a judge and clerk to hold said election, and should certify the result thereof to the county board of election commissioners, who were directed to canvass same and certify the result to the court. The sheriff was also directed to publish the order in the Harlan Enterprise, a weekly newspaper published in Harlan, Kentucky, at least twenty days before the date of the election, and also to advertise the election by written or printed handbills posted in five conspicuous places in said district for at least twenty days before the election.

A certified copy of the order was given to the sheriff by the county court clerk, and the sheriff immediately

caused it to be published in the Harlan Enterprise, as required by law. The sheriff further clipped five copies of the printed order from the Harlan Enterprise, and had these posted in five conspicuous places in the district for the required time. The election was held at the Evarts school house in the proposed district on the day provided in the order. Fifty-six legal votes were cast in favor of the tax and eighteen against it. The returns of the election were canvassed by the county election commissioners, and the result certified as required by the statute.

1. It is insisted that the election was not duly advertised because the alleged handbills were not sufficient and were not posted by the sheriff or any of his deputies. A handbill is simply a written or printed notice displayed to inform those concerned of something to be done. The statute only requires a written or printed handbill. We, therefore, conclude that copies of an advertisement containing the county court order calling for an election to be held at a certain time and place in the proposed district, and properly posted in five conspicuous places for the required time, constituted a substantial compliance with the statute. Nor do we think there is any merit in the contention that the sheriff himself did not post the notices. It is true that in advertisements of sales by the master commissioner this court has expressed its disapproval of the commissioner's employing others to post notices of sales, but the reason for that is that the commissioner is required to report that he advertised the sale, which he could not properly do if the matter were entrusted to others. In the case of school elections the statute merely provides that the sheriff or other officer shall have the notices posted. He is not required to report that he has done so. In this case the evidence conclusively shows that the notices were posted in five conspicuous places, and the fact that the sheriff himself did not post them cannot be regarded as material; especially in view of the fact that a very large vote was cast at the election, and it does not appear that any voter was prevented from voting because he was not notified of the time and place for holding the election.

2. The petition asking for the election is attacked on the ground that the description of the proposed boundary and of the proposed school house site was ap-

pendent to the petition after it had been signed and filed with the county court. If the description so appended had in anywise changed the boundary of the proposed district or of the school house site, there might be some merit in this contention. As a matter of fact, however, the petition itself asked for the establishment of a graded school district with the same boundary as the old common school sub-district, and with the same school house site as theretofore existed. The appended descriptions simply described by metes and bounds the old boundaries of the existing common school sub-district, and of the school house site. The effect was not to add to or take from the boundaries set out in the petition, but merely to describe with greater accuracy the boundaries contained in the petition. That being true, the fact that these descriptions were appended after the petition was signed and filed did not vitiate the petition.

3. The statute requires that the petition for the establishment of a graded school district shall be approved by the trustee of each sub-district affected. Kentucky Statutes, Section 4464. The contention is made that this provision of the statute was not complied with. The petition, which is now before us, shows that after the words "we hereby approve of the petition herein to establish a graded school at Yocums Creek, this Mch. 28, 1914," occurs the following signature: "J. H. Middleton, Trustee." The record shows that Middleton was the trustee of the sub-district affected. Middleton says that he has no recollection of having signed the petition. The man who prepared the petition says that he was present and saw Middleton sign it. It also appears that Middleton took an active interest in favor of the proposed graded school district. On these facts we are not disposed to reverse the trial court and hold that the petition was not approved by Middleton.

4. It is next insisted that Section 4467 of the Kentucky Statutes was not complied with, in that the question, "Are you for or against the graded common school tax?" was not properly propounded to the voters. We have not been cited to any evidence in the record tending to establish this fact; on the contrary, the judge of the election and many witnesses testified that the question was properly propounded to each of the voters. On the whole, we conclude that in the proceedings leading up to and following the election, and in the conduct of the

election itself, there was a substantial compliance with the statute, and that the chancellor properly refused to enjoin the collection of the tax.

Judgment affirmed.

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**Goff, et al. v. Daniels.**

(Decided February 10, 1915.)

**Appeal from Pike Circuit Court.**

1. **Fraudulent Conveyances—Conveyance by Husband to Wife—Question of Fraud.**—The question whether a voluntary conveyance from a husband to his wife is fraudulent, is not to be determined from the mere fact that the husband was indebted at the time, but from all the circumstances of the case; and if the circumstances do not establish fraud, the conveyance is deemed to be above exception.
2. **Husband and Wife—Conveyance by Husband to Wife—When Court of Equity Will Approve.**—If a court of equity would have required a husband to convey to his wife land which was bought with her money and conveyed to him by mistake, it will approve a conveyance of said land which he voluntarily made to his wife.
3. **Fraudulent Conveyances.**—As to subsequent creditors a conveyance is not fraudulent merely because it is voluntary.

J. M. ROBERSON and R. H. COOPER for appellants.

C. M. WHITT for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—**  
Reversing.

The appellants, W. T. Goff and Nancy Goff, are husband and wife. In the spring of 1910 W. T. Goff became indebted to appellee, Daniels, in the sum of \$84.75, for which amount Daniels obtained a judgment against Goff on April 21, 1911. An execution having been issued upon the judgment and returned "no property found," Daniels filed this creditor's bill in the Pike Circuit Court on May 25, 1912, to set aside as fraudulent a deed of March 7, 1912, by which W. T. Goff conveyed to his wife, Nancy, a small tract of land on Pond Creek, in Pike county. The action was brought under Section 1906 of the Kentucky Statutes, which reads as follows:

"Every gift, conveyance, assignment or transfer of or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers or other persons, and every bond or other evidence of debt given, action commenced, or judgment suffered, with like intent, shall be void, as against such creditors, purchasers and other persons. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had no ice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

The answer denied the charge of fraud and affirmatively alleged that the land in question really belonged to Nancy; that she had paid for it with her own money; and that the title had been taken to her husband through a mistake of the draughtsman who drew the deed.

The chancellor granted the prayer of the petition, and subjected the lands to the payment of Daniels' debt; and from that judgment Nancy Goff and W. T. Goff appeal.

Nancy Goff explains the transaction by which the land was conveyed to her by her husband as follows:

On July 21, 1904, she bought from a mining company in West Virginia certain property in Williamson, West Virginia, for which she paid \$1,250.00, taking the title to herself as her separate estate; that this property greatly enhanced in value, and was sold by Nancy on March 7, 1908, to Alice Moore and others, for \$2,800.00. On October 27, 1910, Vicy Goff, the mother of W. T. Goff, and Nancy Goff bought the land here in question from Clelland Davis for \$500.00, Vicy Goff furnishing one-half of the money. Nancy Goff testified that she bought and paid for the other half interest with a part of her own money received from the Moore heirs, as above stated; that, in making the purchase, her husband, W. T. Goff, acted as her agent; that she furnished him the money to pay her half of the purchase price; but that by mistake Davis drew the deed to Vicy Goff and W. T. Goff, the persons with whom he traded.

This mistake is explained by the fact that W. T. Goff was not present when the deed was drawn and delivered to his mother, and that it was recorded before Nancy Goff discovered the mistake. Nancy repeatedly demanded of her husband that he correct the deed by

conveying the land to her; and this he finally did on March 7, 1912. This version of the transaction as to how the mistake was made and finally corrected is sustained by the testimony of W. T. Goff and Nancy Goff. They are corroborated to some extent by Davis, and are not contradicted by anybody.

The case, therefore, stands solely upon the testimony of W. T. Goff and Nancy Goff; and as they show that Nancy Goff had the means with which to buy the land in question, and furnished it to her husband for that purpose; and that the title was taken in the name of W. T. Goff by mistake, it becomes our duty to apply the law under these established facts and protect the interest of the wife by approving the transfer of his wife's property to her, if the land should have been conveyed to her originally.

This is not the usual and ordinary case contemplated by the statute where an insolvent debtor conveys his land to his wife, without consideration. On the contrary, it is a case where the wife's property was, by mistake, conveyed to her husband without consideration, and there is an attempt to subject it to the payment of his debt.

In speaking of a voluntary conveyance to a wife or child, in *Duhme v. Young*, 3 Bush, 350, this court said:

"The question, whether it is fraudulent or not, is to be ascertained, not from the mere fact of indebtedment at the time, but from all the circumstances of the case; and if the circumstances do not establish fraud, the voluntary conveyance is deemed to be above all exception."

This case is in its essential features similar to *Taylor v. Cooley*, 20 Ky. L. R., 1365, 49 S. W., 335, where it was said:

"It may be true that S. W. Cooley transferred to his wife some of the property in question, but the same appears to have been in accordance with an agreement between them that the same should be done on account of large sums of money received and used by S. W. Cooley, which was in fact money or property inherited by his wife from her father, or other relatives, and it does not appear that such transfer was in fraud of any creditor, or that such transfer tended to mislead or defraud any of the creditors of S. W. Cooley."

Likewise, in *McCandless v. Rea*, 21 Ky. L. R., 1687, 56 S. W., 10, a husband who had received a sum of money



from his wife's father, conveyed real estate to his wife pursuant to his promise to secure the money to her benefit, and the court declined to set aside the conveyance as fraudulent as against the husband's creditors.

In *Campbell v. Campbell's Trustee*, 79 Ky., 395, as here, the husband bought land with his wife's money and took the title to himself without her knowledge or consent, and subsequently conveyed the land to his wife. In a suit by his creditors to subject the land to the payment of his debts the court said:

"It appears that the husband did not pay any part of the \$7,800, but the whole of that sum was paid by his wife with the proceeds of her land and distributable share. It, therefore, follows that her equity is superior to the equity of his creditors, and unless some inexorable legal rule can be interposed to defeat her claim to the 131 acres of land, justice demands that it should not be taken from her for their benefit.

"She neither consented nor acquiesced in making the title to her husband, and her conduct is without fraud, and free from any just suspicion of dishonesty.

"And this court has held, in the case of *Miller and Wife v. Edwards, &c.*, 7 Bush, 397, the facts of which are analogous to this case, that 'such a contract as that made with her husband before her land was sold is valid and enforceable as between the parties to it, as a prudent mode of preserving her estate against his improvidence or capricious power.'

"This principle of law seemed to be so well established that the court said in that case, it 'now requires no citation of authorities in its support.' "

The principle above announced is recognized in *Doty v. Louisville Banking Co.*, 10 Ky. L. R., 899, 11 S. W., 78; *Darling v. Hanks*, 21 Ky. L. R., 147, 42 S. W., 1130, 51 S. W., 792; *Trosper v. Collins*, 25 Ky. L. R., 115, 74 S. W., 710; and in other cases.

A court of equity would have required W. T. Goff to do this at any time at the suit of his wife, upon the facts shown in this record; and if the chancellor would have required him to make the transfer under the circumstances, it will approve that which he did voluntarily.

Furthermore, it will be noticed that the debt of Daniels was created in the spring of 1910, and the conveyance by Davis to W. T. Goff was not made until October

27th of that year. So, it cannot be said that Daniels gave credit to W. T. Goff upon the faith of his ownership of the land in question. As to subsequent creditors a conveyance is not fraudulent merely because it is voluntary. *Duhme v. Young*, 3 Bush, 343; *Place v. Rhem*, 7 Bush, 585. As no fraud has been shown, but only an act of justice by W. T. Goff to his wife, her superior equity should be protected.

Judgment reversed with instructions to dismiss the petition in so far as it seeks to subject the land of Nancy Goff.

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### **Bagwell v. Copeland, et al.**

(Decided February 10, 1915.)

#### **Appeal from Graves Circuit Court.**

1. **Evidence—Damages—Action for Assault Upon Female—Verdict.**—In an action for assault upon a female with intent to have carnal knowledge of her, the evidence is examined and held sufficient to support the verdict.
2. **Evidence—Witnesses.**—Where the defendant had in his evidence attacked the moral character of the plaintiff, and in rebuttal the plaintiff's attorney announced that he had some character witnesses to introduce and the court said, "let them be considered introduced," the defendant cannot complain of being deprived of the right to cross-examine such witnesses when the record fails to show that they were ever in fact introduced, or that any statement as to what their evidence would be was submitted to the jury.

STANFIELD & STANFIELD for appellant.

W. S. FOY for appellees.

#### **OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

Appellees, husband and wife, instituted this action against appellant, charging an assault by him upon the female plaintiff with intent to have carnal knowledge of her; the jury returned a verdict for the plaintiffs for \$500, upon which judgment was entered, and the defendant has appealed.

Mrs. Copeland testified that she and her husband were tenants of appellant, and had been, at times, for several years; that one morning in October, 1913, ap-

pellant came to their home, on the place, at a time when he knew her husband was absent, and when only her three months old infant was at the house with her, and took hold of her arms and wrists and refused to turn her loose upon her frequent demands; that he continued to hold to her until her sister-in-law appeared upon the scene, when he promptly released his hold and left. The sister-in-law fully corroborated her statements, testifying, in substance, that she saw appellant have hold of Mrs. Copeland, heard her demanding to be released, and that he did not release her until the presence of the witness was discovered.

The defendant testified that he did not assault the female plaintiff; that he did not take hold of her arms and wrists, but admitted that he was at the house at the time and that when Mrs. Copeland showed him a roll of goods which she had purchased, he did place his hand upon her hand by way of congratulating her on the roll of goods purchased.

The verdict, instead of being flagrantly against the evidence, is in accord with its weight.

Appellant further introduced witnesses who, more or less successfully, impeached the moral character of the female appellee; but, in rebuttal, it was announced by appellee's attorney that he had some character witnesses to introduce, when the court said, "Let them be considered introduced," whereupon the defendant excepted. But there is nothing in the record, or in the bill of exceptions to show that any such witnesses were introduced; that any statement as to what their evidence was or would be was given to the jury; what their names were, or whether the defendant offered to cross-examine them or any of them, or whether he had been denied such privilege.

The appellant complains bitterly of being denied the right to cross-examine these witnesses when the record fails to disclose, not only what their evidence was, but whether in fact they were ever introduced.

Certainly, if the witnesses were never introduced, and gave no testimony, appellant was deprived of no right guaranteed to him by law, for he had no right to cross-examine them until they were introduced and their evidence in chief heard.

We see no error in the record and the judgment is affirmed.

**J. D. Bentley v. Ballard & Herring.****J. D. Bentley and Serilda Bentley v. Same.**

(Decided February 10, 1915.)

**Appeals from Pike Circuit Court.**

**Landlord and Tenant—Fires—Repairs.**—Where there was no express covenant on the part of the tenant to repair the premises or to keep them in repair, and the obligation was to surrender the premises at the end of the term in as good condition and order as they were at the time of the contract, does not impose upon the tenant a liability to repair or restore in the event of destruction of the premises, or a material part of them, during the term, by fire, unless the fire was the result of default or negligence of the tenant.

**J. S. CLINE** for appellants.

**J. M. YORK** for appellees.

**OPINION OF THE COURT BY JUDGE HURT—Affirming.**

These suits were instituted in the Pike Circuit Court; the one is that of J. D. Bentley against Ballard & Herring, and the other that of J. D. Bentley and Serilda Bentley, his wife, against Ballard & Herring. These suits were consolidated by an agreed order in the circuit court and heard and tried together. In the first named suit J. D. Bentley claims that, under a verbal contract, he let to rent to Ballard & Herring a store house and a portion of a barn and some adjacent lands, and under the contract of rental, Ballard & Herring agreed that they would take good care of the premises and would be responsible for all damages that might occur to him during their occupancy of the premises, and would leave the premises at the end of their term in as good repair and condition as they then were, and just as they then were; that thereafter Ballard & Herring erected at the rear of the store room a building which they used for a cook room and kitchen; that they negligently and carelessly constructed the cook room, and put the stove pipes through the roof of the house without any flues in which to place the pipes, and that the roof of the house was made of tar paper and the walls covered with paper, and that the improper and negligent manner in which they had constructed the house and located the stove pipes, and negligent use of the

house and premises, the cook room caught on fire from said improper fixing of the stove pipes, and that the fire was communicated to another store house which appellant had near by, and from that it was communicated to the store house which he had rented to Ballard & Herring, and that it resulted in all of the building being consumed, and, in addition thereto, twenty apple trees which grew on the land adjacent to the store building, and that said buildings so consumed were reasonably worth the sum of \$2,900.00, and that Ballard & Herring had failed to perform and keep their contract with him, by failing to take good care of the premises leased to them, which resulted in the burning of the buildings, and had further failed to keep their contract by failing to pay the damages which happened to him during their occupancy of the premises, and by not leaving the premises in as good condition as they were at the time of the contract, and for that reason asked a judgment against them for the value of the store houses burned, in the sum of \$2,900.00.

In the suit of J. D. Bentley and Serilda Bentley against Ballard & Herring, substantially the same allegations were made in the petition as to the contract between J. D. Bentley and Ballard & Herring, and it was further alleged that Bentley and his wife, as partners, were the owners of a stock of goods placed in a store house near to the one rented to Ballard & Herring, and that by reason of the gross negligence and carelessness of the defendants in the construction of the cook room, and their negligence in their use of the building, that the building caught on fire, as stated above, and that the stock of goods owned by them was consumed by the fire, and that same was reasonably worth \$3,000.00, and asked to recover a judgment for that sum against Ballard & Herring.

Ballard & Herring filed answer in each of these cases, in which they traversed the allegations in the petitions regarding the terms of the contract, and denied any negligence in the erection or the use of the buildings, and further plead, that after they had erected the cook room, that the plaintiff, J. D. Bentley, against their consent, erected the store room in which the goods were consumed, upon land which he had leased to them, and built his store house very close to their cook room, and that by reason of that fact the store house in which the

goods were kept took fire and burned, and communicated the fire to the other store house, and that but for the fact of his carelessly and negligently and wrongfully taking possession of a portion of the land which he had leased to them, and negligently building his store house near to said cook room, neither the store house in which the goods were would have been burned, nor the one which he had let to them. The affirmative allegations in these pleadings were traversed, and upon a hearing of the two suits together, the jury found a verdict for the defendants. At the close of the appellant's evidence the appellees moved the court to direct the jury peremptorily to find a verdict for them, which the court overruled, and to which appellees excepted.

The appellants asked the court to give an instruction to the jury which, in substance, was, that if the jury believe from the evidence that the appellees negligently and carelessly erected a cook room, and by reason thereof said cook room caught on fire, and the fire was communicated to the store buildings, and they were burned, to find a verdict for the appellant, J. D. Bentley, in their discretion, not exceeding \$2,900.00. The court refused to give this instruction, to which the appellant excepted, and upon its own motion gave instructions A, one, two, three, four, five, six and seven. To the giving of all of these instructions the appellants objected, and their objections being overruled, took proper exceptions. The appellants filed grounds in each of these cases, and moved the court to set aside the verdict of the jury, and to grant a new trial, which motion the court overruled in each case, and the appellants took exceptions thereto, and they now appeal to this court.

In order to determine what the court should have done upon the trial of these cases as regards instructions to the jury, it becomes necessary to make a statement of what the evidence conduced to show, and we will first state the testimony adduced for the appellants, so far as same may be necessary for the purpose in hand.

The appellant, J. D. Bentley, stated that he had first leased the old store building and a portion of the barn, and certain lands adjacent thereto, to appellees for the period of one year, and entered into a written contract with them; that at the end of the time for which the property had been leased that he made a new contract for the letting of these premises to Ballard & Herring,

and in regard to what the contract was, which was verbal, he states as follows:

"Q. After twelve months expired was there another contract entered into? A. Mr. Ballard came into my store there and asked me to stay longer in the property, that he wasn't done; I told him under the conditions he couldn't stay; he asked me why. I told him he hadn't done what his first contract said; that my place was all littered up, and the barn, I couldn't get to it to feed, and we had had a fire in a room, and I didn't know when they would have another one in the condition the cook room was in. Q. Tell the jury if there was another contract entered into? A. He turned around to Mr. Buckner and told him to go ahead and clean up the lot, told him to fix up the barn where the holes were around it, and to clean up the place as he was to and get the litterment all cleaned up. I told him if he would leave me as I was then he could stay, and he said alright, he always done that wherever he went; he would leave me as I was, and I could make my bill out, and the rent when he left. \* \* \* Q. I believe you say that the written contract made out with Ballard & Herring expired? A. Yes, sir; about the time it was out, he came in, a day or two before or at the time, he came in the store and named it, and said he was going away about the time it was out, and told me he was going away, and that he wanted to stay there further until he got done, that he wasn't done yet. Q. And he further said to you he would leave your property in as good shape as he found it? A. I told him the conditions he could stay, that the first contract hadn't been filled, that the barn wasn't cleaned up; he says, yes, I will leave you just as good as I find you, I always do that wherever I go."

On cross-examination the same witness made the following statements:

"Q. What did you ask him? A. Mr. Ballard came in and asked me about staying, and I told him the conditions he could stay; he asked me why; I told him he hadn't complied with the first contract about the barn. I couldn't get to it to feed my stock, and I couldn't cultivate the land; and I says, you have had one fire down there, and you may have another one, this cook room may burn us up at any time."

Testifying in regard to the first contract on cross-examination, J. D. Bentley stated as follows:

"Q. How did that description go? A. He was to have the store lot and he was to have around the foot of the hill at the back of the bottom, and up the hollow at the back of the store house, and all the barn on the left; I just donated him the barn, and donated land to build on; would not charge for that; he was to leave the buildings and leave the place in as good shape as he found it when he left. Q. Was that in the original contract? A. It ought to have been. Q. Was it? A. That was the agreement; I showed him where he could build. Q. Didn't you tell the jury while ago that was only in the new contract you made to Mr. Ballard? A. I don't think I did. Q. Are you certain you didn't? A. I told him there was a new contract and how it was. Q. Did you tell the jury in the first contract defendants agreed to leave the land just like they got it? A. That was the understanding both times, to leave it as they found it. Q. Both contracts? A. Yes, sir."

The foregoing is what the appellant states was embraced in the contract under which he let the store house and lands to the appellees.

From other evidence given by him and his witnesses it develops that the first contract, which was in writing, was made about the first of April, and was to continue one year, and among other terms of that contract was that all buildings which the appellees erected upon the lands, at the end of their one-year lease, were to be left on the land by them, and become the property of the appellant, J. D. Bentley. The parol contract upon which he sues, was made, as he testifies, about the time that the previous contract expired.

It also appears that shortly after appellees took possession under their first contract they built a good many houses upon the land, and among others, between the old store house which they received under the contract and the hill behind it, and from twelve to fifteen feet from it, they erected a building to be used as a cook room and dining room, and two other small rooms adjoining them to be used as sleeping rooms.

According to the testimony for the appellant, the cook room was covered with tar paper and the sides of the walls upon the inside were covered with paper. In this room were two stoves, the pipe of one of which pro-



truded through the roof of the house, and the pipe of the other, according to appellant and some of his witnesses, protruded through the side of the house, and, according to some other of his witnesses, went out through the roof of the house. According to the testimony for the appellant, the appellees did not provide any flues in the cook room for the stove pipes, and the appellant called attention of the manager of the appellees to the stove pipes and the want of flues, and offered to furnish brick with which to build a flue, and warned the manager that there was danger of the building taking on fire on account of these flues.

Shortly after making the first contract in April appellant proceeded to build him another store house about ten feet away from the one he had rented to the appellees, and he testifies that he had built the new store house and put in a stock of goods before the appellees began to use the cook room complained of.

Some time in the month of May, after the written contract for the rent of the place had expired, which did so about the first of April, the cook room caught on fire and was consumed. The fire communicated itself to appellant's new store house, because it was only a few feet away, and from it to appellant's old store house, and both of them were consumed.

The question to be determined is what liability was put upon the appellees by the terms of the parol contract, under which they were holding at the time of the destruction of the buildings by fire, and upon which the appellant bases his suit. Clearly, appellant could not rely upon any provisions of the written contract as creating any liability upon the appellees for the loss of the property by fire, because that contract had expired some time before, and no damage had been incurred by the appellant during the time that contract was in force, either from the occupancy of the premises or by reason of the faulty or negligent manner of the construction of the cook room, nor from any negligent use of it during that time, because during the continuance of that contract there was no loss to the appellant of any kind.

It seems, from the evidence of the appellant, that the appellees had used the cook room complained of for a cook room, and with the stove pipes situated in it as complained of, and with any defects that might have been

in the building of the house, that might cause it to ignite with fire, for nearly a year before the time that it was consumed. Appellant was fully aware of this condition of the house, and what it was used for during all of this time, because his evidence discloses that he went into the cook room to caution the servants of the appellees who were in the cook room doing the cooking, in regard to the liability of fire from it, and he states that he saw how it was built, and furnished, and the manner in which the stove pipes were fixed in the house, and with full knowledge of these conditions, and that the cook room was to be used as theretofore, he relets the property to the appellees for a longer time, without requiring them to make any change in the construction or the use of the cook room. It appears that under the first written contract that at its expiration this cook room became the property of the appellant and he was at liberty to repair it and to change its construction, if he had so desired. Thus, we have the appellant knowing all about how the cook room was constructed, and the defects in it which he complains of, reletting it after several months of use by the appellees for the purpose of a kitchen, and for the same purpose for which it had been theretofore used. It was in close proximity to his buildings, and he could not fail to be fully aware of all of the dangers arising from its use as a cook room, if there was any such danger, and we do not see how he could be heard to complain of any fire which originated from it by reason of the manner in which it was constructed. The only liability which could attach to the appellees under such a statement of facts, so far as relates to the destruction of the buildings by fire would be from their failure to use ordinary care in the use of the building to prevent fire, in the condition that it then was.

In 24 Cyc., 1089, the following rule is laid down as applying to such contracts as appellant testifies he had with the appellees: "However, where there is no expressed covenant in the lease requiring the lessee to repair the premises or keep them in repair, an expressed stipulation binding the lessee to surrender the premises, at the expiration of the term, in as good order and condition as the same now are, reasonable use and wear and tear excepted, is construed to be merely the expression of an obligation which the law would imply

in its absence, and does not impose upon the lessee a liability to repair or to restore in the event of destruction of the premises, or a material part thereof, during the term, by fire or other unavoidable accident. Now, however, in some jurisdictions, by statutory enactment or judicial construction, no covenant or promise by a lessee to keep and leave the demised premises in good repair will require him to rebuild, if the premises are destroyed by fire or other casualty, without fault or negligence on his part, unless the language of the lease shows plainly that it was the intention of the parties that he should be so bound."

According to the terms of the contract between the appellant and the appellees, there is no expressed covenant to repair the premises or keep them in repair, and the obligation which appellant says the appellees took upon themselves was to surrender the premises, at the end of their term, in as good order and condition as the same now are, and, in the language of the appellant, "he would leave me as I was."

Section 2297 of the Kentucky Statutes provides: "That unless the contrary be expressly provided for in the writing, no agreement of the lessee that he will repair or leave the premises in repair shall have the effect of binding him to erect similar buildings, if, without his fault or neglect, the same may be destroyed by fire or other casualty, etc."

Under the facts of this case no fault or neglect could be imputed to the appellees for the use in a proper manner of the cook room, when it was in the same condition as it was when appellant let it to them. In order to make them liable for the damages suffered by the appellants it would have to appear that the appellees were guilty of some neglect, which resulted in the fire, and there seems to be a total absence of proof to that effect, the evidence showing simply that the servant of appellees was cooking in the room, and, having stepped out for a few moments in attending to her duties in preparing vegetables to be cooked, when the building was discovered to be on fire.

While the evidence for the defendants tends strongly to show that the pipes were arranged under the direction of the appellant, and in the manner in which he directed them to be fixed, but we have arrived at the conclusion, without considering anything except the evi-

dence for the appellants, that the motion of the appellees for an instruction to the jury directing them to find a verdict for appellees at the close of the evidence for the appellants ought to have prevailed.

While the instructions given by the court were erroneous, but, inasmuch as the appellees were entitled to have the jury to find a verdict for them, the instructions were more favorable to appellants than they were entitled to, and hence could have been in no wise prejudicial to them.

The errors in the exclusion of evidence complained of by appellants do not relate to anything except the measure of damages for the losses sustained, and the appellees, not being liable for the losses, were not prejudicial to appellants.

It is, therefore, ordered that the judgments appealed from be affirmed.

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**James L. Thomas, Administrator v. Wesley Thomas,  
et al.**

(Decided February 10, 1915.)

**Appeal from Allen Circuit Court.**

1. **Appeal—Dismissal.**—An appeal, taken by a party to a suit, who the record shows had no interest in the result of the determination of the question about which the appeal is taken, will be dismissed.
2. **Appeal—Amount in Controversy—Jurisdiction.**—If the record shows that the amount in controversy upon an appeal is less than is necessary to give the Court of Appeals jurisdiction, the appeal will be dismissed.

THURMAN B. DIXON for appellant.

JOHN H. GILLIAM and W. D. GILLIAM for appellees.

**OPINION OF THE COURT BY JUDGE HURT—Dismissing appeal.**

This is an appeal from the Allen Circuit Court by James L. Thomas, administrator of the estate of Nancy Watkins. It seems that at the January term of the Allen Circuit Court that the attorney for the plaintiff in this cause produced a contract which he had entered

into with the appellant, by which he was to be paid a fee of \$350.00, presumably for his services in the case, but the contract not being before the court, we are unable to say what it embraced. The court, upon his motion at that time, ordered that \$350.00 be paid to him, and that it be taxed as costs, and that the commissioner of the court pay it to him out of the proceeds of the sale of the land. The only other thing in the record is an order made at the April term, 1914, by which it appears that some person having an interest in the funds in the hands of the commissioner came into court and moved the court to set aside the order allowing the attorney a fee of \$350.00 for reasons stated in the order, and that thereupon the court set aside the order allowing the \$350.00, and in place of it made an order allowing the attorney the sum of \$250.00 for his services in bringing and prosecuting the action, and for other services performed and to be performed by him, and that said sum be taxed as costs, and paid to him by the commissioner of the court out of the funds in his hands. To the making of the last order the transcript recites: "To which ruling of the court the parties, by attorney, except and object, and pray an appeal to the Court of Appeals, which is granted." From the judgment of the court in this order the administrator of Nancy Watkins, who is the plaintiff in the suit below, has appealed to this court.

It does not appear that the appellant, James L. Thomas, administrator of the estate of Nancy Watkins, has any interest in this appeal whatever; that the attorney for whose benefit the order of allowance was made, and upon whose motion it was made, is the party in interest, whose duty it was to appeal to this court if he felt aggrieved by the order from which the appeal was taken.

It seems that the amount in controversy upon this appeal is only \$100.00, and said amount not being sufficient to give this court jurisdiction of the appeal, it is not necessary to enter into any discussion of the questions raised on the appeal; and it is, therefore, ordered that the appeal be dismissed, both because the appellant is not the party in interest and because this court has no jurisdiction of the appeal.

**National Surety Company, et al. v. Price, et al.**

(Decided February 10, 1915.)

**Appeal from Jefferson Circuit Court  
(Chancery Branch, Second Division).**

1. **Principal and Surety—Contractor's Bond—Notice of Claims Unpaid.**—Where in a contractor's bond the obligee is required to withhold payments from the contractor, and to notify the obligor, after he has notice or knowledge of the fact that any claim for labor performed or for materials or supplies furnished the contractor "remains unpaid," the words "remains unpaid" apply only to claims where payment has been demanded and either refused or neglected for an unreasonable length of time.
2. **Principal and Surety—Contractor's Bond—Notice of Claims Unpaid—Evidence.**—In an action on a contractor's bond requiring the obligee to withhold payments to the contractor, and notify the obligor, after he has notice or knowledge of the fact that any claim for labor performed or for materials or supplies furnished the contractor remains unpaid, evidence examined, and held that the obligee did not pay out money, or fail to notify the obligor within a reasonable time after having notice or knowledge of the fact that certain claims of the sub-contractors remained unpaid.
3. **Mechanics' Liens—Statutory Notice of Intention to Claim Lien—Time.**—Where the principal contractor abandons his contract, and the sub-contractors are told by the owner to go on and complete the work, the time for giving the statutory notice of an intention to claim a lien should date, not from the time the last item was furnished while the contractor was in charge, but from the time the last item was furnished after the owner directed the sub-contractors to go ahead and complete the work.
4. **Mechanics' Liens—Credit.**—It is not error to credit a sub-contractor by the amount of a note executed by the principal contractor to him, and discounted by a bank, though the note still be held by the bank, where it appears that the contractor is insolvent and the sub-contractor will have to pay the note.
5. **Mechanics' Liens—Notice of Intention to Claim Lien—Additional Work—Extension of Time.**—Where additional work or material is not only required by the contract, but is furnished at the request of the owner, it will extend the time for giving the statutory notice of an intention to claim a lien.
6. **Mechanics' Liens—Notice of Intention to Claim Lien—Sufficiency.**—A notice which fails to state the amount for which a mechanics' lien will be claimed is insufficient.
7. **Assignments—Existence of Fund.**—An equitable assignment will be created only where there is a fund in existence belonging to the assignor.
8. **Mechanics' Liens—Personal Judgment—Evidence.**—Where a sub-contractor claimed a personal judgment against the owner on

the ground that the owner made a binding promise to pay, evidence considered, and held that the chancellor did not err in holding that no such promise was made.

9. Interest—Funds Retained by Owner.—Where a part of the contract price is retained by the owner, it is not error to charge him with interest after suit has been brought to settle the questions of liens and adjust the liability of the surety on the contractor's bond, where the owner fails to pay the money into court.
10. Principal and Surety—Contractor's Bond—Attorneys' Fees.—Where a contract between the owner and the principal contractor provides "that the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any liens on said premises made obligatory in consequence of the contractor's default," a bond executed by a surety company guaranteeing the faithful performance of the contract by the contractor does not cover attorneys' fees incurred in resisting mechanics' liens.

JOHN BRYCE BASKIN, M. A., D. A. & J. G. SACHS and BEN-JAMIN SACHS for appellants.

FRED FORCHT, JR., P. J. COSGROVE, WM. F. CLARK, JR., FURLONG, WOODBURY & FURLONG, PRYOR & CASTLEMAN and DAVID R. CASTLEMAN for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming on original and cross-appeals.

In February, 1912, W. B. Price contracted with Nicholas Collett to build for him a residence in Audubon Park, a suburb of Louisville, for the sum of \$9,200. To insure the performance of the contract Collett executed and delivered to Price a bond with the National Surety Company as surety. Work on the building was begun in the month of March. About the first of September Collett began to default. The local agent and representative of the bonding company was notified. On September 26th formal written notice was sent to the bonding company that Collett had defaulted in the contract, and that the work would be completed under the supervision of the architect, as the contract required. Meyer was the architect, and had full authority to represent the owner.

This action was brought to enforce certain mechanics' liens on the property, and to determine the liability of the surety. The case was referred to the master commissioner to hear evidence and report. Several liens, aggregating \$4,066.87, were allowed. The commissioner further reported that Price, the owner of the building, was entitled to a judgment for the amount of these

claims, subject to a credit of \$1,928.82, the balance of the contract price in his hands. The lien claim of Henry J. Schoo was disallowed. Judgment was entered in conformity with the commissioner's report. From that judgment the National Surety Company and Henry J. Schoo appeal, and W. B. Price, the owner, prosecutes a cross-appeal.

We shall first discuss the liability of the surety company. Sections 2 and 4 of the bond are as follows:

"2. The obligee shall, at the times and in the manner specified in said contract, perform all the covenants, matters and things required to be by the obligee performed; and if the obligee default in the performance of any matter or thing in this instrument, or in said contract agreed or required to be performed by the obligee, the company shall thereupon be relieved from all liability hereunder."

"4. If at any time during the prosecution of the work specified in said contract to be performed there come to the notice or knowledge of the obligee the fact that any claim for labor performed or for materials or supplies furnished the said principal in or upon said work remains unpaid or that any lien or notice of lien for such work, materials or supplies has been filed or served, the obligee shall withhold payment from the principal of any moneys due or to become due to the principal under said contract until the payment of such claim or the cancellation and discharge of such lien or notice of lien, if any, and will so notify the company, giving a statement of the particular facts and amount of each such claim, lien or notice of lien."

It is the contention of the surety company that it was released from all liability under the bond by reason of the fact that Price, the obligee, after having notice of unpaid claims, not only failed to withhold payments to the contractor, but also failed to give reasonable notice of such facts to the surety company. To determine this question it will be necessary to give a somewhat detailed statement of the evidence.

As before stated, Meyer was Price's agent for the purposes of the contract. The work on the contract was begun in March, 1912. The Corey-Scheffel Lumber Company delivered \$75.24 worth of lumber on April 9th. On April 12th that company wrote to the architect that that much lumber had been delivered. The letter also contains the following statement:



"Mr. Scheffel advised that you will protect us on all material we notify you about. We hope that you will keep this matter confidential, as we do not care to have the matter get to Mr. Collett."

On May 15th a second letter was sent to Meyer, notifying him that \$312.75 worth of lumber had been delivered up to that date. On May 20th a third letter was sent notifying Meyer that the firm had delivered \$335.64 worth of lumber. Each of the letters contains a paragraph similar to the one above quoted. On May 21st Meyer wrote to the Corey-Scheffel Lumber Company, telling them that some time prior thereto he had written them that the matter would have to be brought to the notice of Mr. Collett, and that he could not make settlement unless he received an order through him. The letter also suggested that the firm get a settlement from Collett without troubling the writer. Mr. Scheffel testifies that he wrote the letter above referred to. Before he furnished the lumber he went to Meyer and told him that he would expect him (Meyer) to protect him. On June 10, 1912, he received \$200 on his account. He possibly had four or five conversations with Meyer about getting his money. Meyer said that there would be enough to settle his claim. For this reason he was not uneasy about it until towards the end. Both before and after the credit he tried to get money from Meyer. When he received the \$200 Collett gave him an order for it. When the payment was made it was satisfactory and he accepted it. He was in Meyer's office every two or three weeks after the payment and discussed the account with him. He was not looking to Collett for his money; he was looking for the architect and builder to protect him.

J. Guy Everet, who had a claim for the tin work and roofing, which was begun in April or May and not completed until the fall, testified that he received an order for \$500 on July 20th. His whole debt was only \$672. The \$500 was all he asked for. The work was not entirely completed, and he was not in the habit of asking for full payment until the work was completed. The payment was satisfactory to him.

E. L. Hughes, a member of the Hughes-Byron Company, testified that after he had furnished about \$200 worth of material, he asked payment on account, and was given an order by Collett on May 28th, for \$150.

This order was presented to Meyer and paid. The only interview that he had with Meyer was at the time of this payment. The payment of the \$150 on May 28th was entirely satisfactory. Thought that prior to that time he had talked to Meyer, and that after that time he also talked to Meyer about getting money, but was not positive as to this. Was not able to state any conversation he had had with Meyer, because practically he had had none about the money.

Henry Schoo testified that a day or two before he filed his mechanics' lien, during the month of September, he had a talk with Meyer in regard to his claim, and that Meyer promised that if he would go ahead and complete the work he would see that he was paid. On the question in controversy Mr. Meyer, the architect, testified on cross-examination as follows:

"Q. Mr. Meyer, when did you first learn that Collett was not paying his sub-contractors, or any of them? A. The first part of May, as a protection both to the owner and people—to protect one side as well as the other, we tried to keep track of the contractor—whether they were paying out to the materialmen the money we were paying out on the contract; and from time to time we noted any default with these people, and, as a matter of fact, Mr. Collett himself would tell us of different bills he had not paid, and promised to pay these bills. Q. When did that first begin? A. So far as they were not paid constantly, I heard from his contract—different bills he had not paid. Q. Along in April and May—as early as that? A. Corey-Scheffel Lumber Company—yes, in April and May, they claimed a bill of \$300 and said he had given them but \$200 on account, for which he gave me a receipt; and so he had paid them part of their account. I have got a receipt from him showing that he had paid it, but claimed he only owed them a balance of \$89. I was keeping track of him, and the amount of money he was paying. Q. Did Corey-Scheffel, in their letter of April 12th, talk to you about the balance of \$75 shown in their letter? A. Not about this. I don't know we ever had any discussion about that. You see, that is part of their whole statement. Q. Did you have any talk with them about the \$312.75? A. They simply notified me. We were keeping track of him. Afterwards we took up this—this balance—and told them, as far as I knew at that time, in May, he was going to come out

all right on his contract. He was paying some part of them. Q. When did you have any conversation with any other sub-contractors about not getting their money? A. One or two. Only one other man came to me originally, and that was Henry Schoo, who put in a stairway, and after he finished he asked us about a payment on the thing. We asked him how much he had paid him. He said he was unable to get his money out of him. Q. When was that? A. I can't give you the exact date. I should say this was along about June—the right date, and this was the original bill. I have got a copy of his bill he mailed me. Q. That was about the last of June? A. I should say it was. Q. Didn't you have conversations with quite a number of those along in August? A. I don't doubt but what a number of these men took up this thing with me on the question of payment. From September 26—three or four weeks prior to that date—we had three or four of these men to talk it over, as well as from that time on, we likely had a lot of them—I couldn't give you the dates of them, after we refused to pay them.”

Subsequently, Mr. Meyer was recalled for further examination. In the meantime, he had read over his former deposition, and was also consulted by counsel for Price. On his recall he testified that there were two points in his former deposition that were not correct, one in regard to the Corey-Scheffel claim, and the other in regard to the Schoo claim. In his former deposition he stated that he knew of the default by Collett in April or May. At that time, however, there was no claim on the part of the Corey-Scheffel Company that Collett had refused to pay his bill, and the three letters in question were the only information he had on the subject. Some time after the payment of the \$200 Scheffel told him that his bill had not been paid. How long after, he was not able to say. He was also mistaken in saying that Henry Schoo had asked him about a payment on his account in June. The conversation did not take place until after Schoo's work was finished, and that was some time in September. Witness also stated that he had no information or notice of any other claim being unpaid by Collett, except the two mentioned and the claim of J. D. Case, who was a sub-contractor. As to all the other claims involved, the evidence conclusively shows that Meyer had no knowledge of the fact that they were not paid until some time during the month of September.

Meyer's evidence further shows the following payments made by him:

"1912.	April 20	Nicholas Collett .....	\$ 200.00
	April 26	" .....	200.00
	May 3	" .....	100.00
	May 17	" .....	500.00
	May 27	Hughes-Byron Co., on acct.	150.00
	May 31	" .....	1,200.00
	June 14	" .....	1,500.00
	June 28	" .....	500.00
	July 19	Guy Everett .....	500.00
	Aug. 2	Central Planing Mill, on acct. of Nicholas Collett.....	160.16
	Aug. 2	Nicholas Collett .....	500.00
	Aug. 16	" .....	1,000.00
Total.....			\$6,510.16"

Before considering the effect of the evidence above set out, it becomes necessary to determine the proper construction of the words "remains unpaid" as applied to claims for labor and materials in the fourth clause of the bond. It is well settled that a bond like the one in question is an insurance contract, and should be construed so as to afford the insured the protection for which he paid. *Lewis v. U. S. Fid. & G. Co.*, 144 Ky., 428; *Champion Ice Mfg., &c. Co. v. American Bonding & Trust Co.*, 115 Ky., 863; *Aetna Life Ins. Co. v. Bowling Green Gas Light Co.*, 150 Ky., 732; *U. S. F. & G. Co. v. Allen Co.*, 122 Ky., 825; *Hormel v. American Bonding Co.*, 33 L. R. A. (n. s.), 513. It will be observed that the bond does not fix a time that the claims shall remain unpaid. If the words should be held to apply to every claim remaining unpaid without regard to time or demand on the part of the claimant, it is manifest that the very purpose of the bond would be defeated. It would impose upon the obligee the absolute duty of protecting the obligor, and relieve the obligor of all liability under the bond. In our opinion, the claim must be due. There must be a demand for payment, and either a refusal or a neglect to pay for an unreasonable length of time; and the obligee should have notice or knowledge of these facts. With these principles in mind, let us examine the facts: The Corey-Scheffel Lumber Company made three deliveries of material in

April and May. The company's bill amounted to \$335.64. As each delivery was made the company advised Mr. Meyer of the delivery by a letter, in which it stated that Mr. Scheffel had advised that he would protect them on material of which he was notified. At the same time the letter asked that he keep the matter confidential, as they did not care to have it get to Mr. Collett. There was nothing in any of these letters to indicate that payment had been demanded of Collett. On June 10th the payment of \$200 was made on the account by Collett. Of the account there remained unpaid \$135, according to Scheffel, and \$89, according to Collett. Scheffel admits that this was a proper proportion of his account according to the custom of the building trade. Scheffel says that he expected no trouble in the settlement of the account. After this payment he continued to furnish other materials. While he claims to have been in Meyer's office every week or two, or every two or three weeks, after the payment, and discussed the account with him, it appears that his whole purpose was to secure the account through Meyer without troubling Collett about it. Nowhere does he show that he actually demanded payment or Collett refused. J. Guy Everett, whose claim amounted to \$672, was paid \$500 on July 20th. The payment was satisfactory, and was all he asked for. The Hughes-Byron Company account amounted to \$200. When Hughes asked payment on account, he was given an order by Collett on May 28th for \$150. The order was paid and the payment entirely satisfactory. There is nothing in the evidence to show that he ever demanded of Collett the payment of the balance. He was not able to state any conversation he had with Meyer, because "practically he had had none about the money." Appellant lays particular stress on the evidence of Meyer when cross-examined for the first time, and insists that Meyer's correction of these statements on his re-examination should not be credited, for the reason that the corrections were made on the suggestion of counsel for Price. Fairly considered, however, we think it clear that Price was mistaken in his original statement. He makes it clear that the only information he had in the spring in regard to the claim of the Corey-Scheffel Lumber Company was conveyed by the letters of that company, which certainly do not indicate that any demand for payment had been made,

and that payment had been refused or neglected for an unreasonable length of time. It is also clear that the conversation which he had with Scheffel did not take place in June. He stated that the conversation took place after the work was finished, and the work was not finished until September. Scheffel also claims that the conversation took place in September. It further appears from the evidence that the company, through its local agent, was fully apprised of all the facts with reference to Collett's default about September 1st, and that on September 26th written notice was given to the company. On the whole, it appears that where payment was demanded by claimants, satisfactory payments were made. They had no reason to expect full payment until their contracts were completed. It does not appear that the payment of any claim was refused or neglected for an unreasonable time after the claim became due and payment was demanded. In the light of all the circumstances, we agree with the chancellor that Price, through his authorized agent, did not pay out any money to Collett, or fail to give reasonable notice of the non-payment of any claim after he had notice and knowledge of such facts as would lead an ordinarily prudent person situated as he was to conclude that any claim remained unpaid within the meaning of the provisions of the bond.

2. The surety company next insists that the chancellor erred in adjudging that appellees, William B. Pell & Brother, Hughes-Byron Company, Miller & Sauer, G. W. Younger, and J. Guy Everett were entitled to liens on the property. We shall consider the validity of these liens in the order named.

(a) William B. Pell & Brother were allowed a lien for \$679.04, with interest. As before stated, Collett, the contractor, abandoned the contract about September 26, 1912. Price, the owner, through his agent, Meyer, took charge of the work and finished it. On being asked whom he had employed to complete the contract, Mr. Meyer testified as follows:

"We used, as far as we could, sub-contractors on the work; that is, men he had—the sub-contractors with Mr. Collett. Where we had those men we told them the condition, and to finish what work they had. Where we had no such contract we employed other people. In doing that we had to use every day other people. Alfred

Struck Company, lumber; J. J. Campbell, plasterer; Lutz & Schmitt, bricklayers."

Of the items composing the claim in question some of them were furnished while Collett was in charge, and some after the work was taken over by the owner. The lien statement was filed in time. The Act of March 22, 1910, as amended by the Act of March 18, 1912, Acts 1912, Chapter 115, page 389, contains the following provision:

"Provided that no person who has not contracted directly with the owner or his agent shall acquire a lien under this section unless he shall notify in writing the owner of the property to be held liable or his authorized agent, within thirty-five days after the last item of said material or labor is furnished, of his intention to hold said property liable, and the amount for which he will claim a lien."

The notice required by the foregoing act was not given to the owner, Price, until about December 10, 1912. It is insisted by the surety company that the notice should have been given within thirty-five days after the last item was furnished under the contract with Collett, and while the latter was in charge, and that materials furnished after Collett abandoned his contract, and while the work was being finished by the owner, can not be considered for the purpose of determining whether or not the notice was given in proper time.

There is eminent authority to the effect that where, under a statutory provision, the right of a contractor, laborer or materialman to a lien for labor performed or materials furnished, depends upon the filing of a statement of claim or a notice to the owner, or the commencement of proceedings to enforce the lien within a prescribed period after the labor is performed or material furnished, the necessary steps to establish the lien must be taken within the time specified under the contract, and after such contract is completed and closed, the time cannot be extended or the right revived by furnishing material or performing labor under a new and independent contract, and tacking the same to the original contract. *Duffy v. Baker*, 17 Abb. N. C., 357; *Cahoon v. Fortune Min. & Mill. Co.*, 26 Utah, 86, 72 Pac., 437; *Miller v. Heath*, 22 Pa. Super. Ct., 313; *Gilbert v. Tharp*, 72 Iowa, 714, 32 N. W., 24; *Chase v. Garver Coal Co.*, 90 Iowa, 25, 57 N. W., 648; *National L. Ins. Co. v.*

Ayres, 111 Iowa, 200, 82 N. W., 607; John T. Noye Mfg. Co. v. Thread Flouring Mills Co., 110 Mich., 161, 67 N. W., 1108; Schulenberg v. Vrooman, 7 Mo. App., 133; Nye & S. Co. v. Berger, 52 Neb., 758, 73 N. W., 274; Hudnit v. Roberts, 10 Phila., 535; Inman v. Henderson, 29 Or., 116, 45 Pac., 300; Lane & B. Co. v. Jones, 79 Ala., 156; Jones v. Swan, 21 Iowa, 181; Crawford v. Blackman, 30 Kan., 527, 1 Pac., 136; Cochecho Bank v. Berry, 52 Me., 293; Maryland Brick Co. v. Dunkerly, 85 Md., 199, 36 Atl., 761; Livermore v. Wright, 33 Mo., 31; Henry & C. Co. v. Fisherdkick, 37 Neb., 207, 55 N. W., 643; Spencer v. Barnett, 35 N. Y., 94; Kunkle v. Reeser, 5 Ohio, N. P., 401.

The rule above announced, however, has no application to the facts of this case. Here it is not sought to tack material furnished under two separate and independent contracts for the purpose of extending the time for filing the notice. The contractor abandoned his contract. The owner did not make a new and independent contract with the appellee Pell. Through his authorized agent he told him to go ahead and finish the work. There was no change in the contract price or in the amount of materials to be furnished. The materials being required by the original contract, and that contract having been continued and adopted by the owner, and the materials having been supplied at his request, the time for giving the statutory notice should date, not from the time the last item was furnished while the contractor was in charge, but from the time the last item was furnished after the owner had told appellee to go ahead and complete his work. *St. Louis National Stock Yards v. O'Reilly*, 85 Ill., 546; *Holden v. Winslow*, 18 Pa., 160; *Nichols v. Culver*, 51 Conn., 177. The claim of appellee was, therefore, properly allowed.

(b) The facts with reference to the Hughes-Byron Company claim and the Miller & Sauer claim present the same questions, and, for the same reasons, these claims were properly allowed.

(c) The first contention with reference to the claim of G. W. Younger & Co. is that it should have been reduced by the sum of \$50, represented by a note executed by the contractor to Younger, and discounted by him at the Commercial Bank & Trust Co., as the evidence fails to show that he had ever taken the note up. We are not disposed, however, to reverse the judgment in favor



of Younger on this ground. It appears from the entire record that Collett is insolvent. Whether Younger has taken up the note in question or not is, therefore, immaterial. He is liable to the bank, and will, therefore, have to pay the note. Under these circumstances, the proceeds of the note cannot be regarded as a credit. In its essential features the facts of this claim do not differ materially from those involved in the claim of William B. Pell & Bro., and for the same reasons a lien on the property was properly adjudged.

(d) The lien claim of J. Guy Everett is attacked on the ground that Everett practically concluded his work under the contract by August 21st, and the written notice was not given until November 11th. It is admitted that Everett did \$12 worth of work in the month of October, but it is argued that as this item was for extra work, it cannot be considered in determining whether or not the notice was in time. The only evidence as to this item is that of Everett, who stated that the item was for tile work on a shed. When the shed was built it was too flat for tiling. The builders told him to put tin on it. This he did. The architects then notified him that the plans called for tiling, and they wanted tiling on it. In pursuance to their direction, he placed the tiling on the shed. It is the general rule that where the work contracted for is completed according to contract, but the contractor later discovered defects and voluntarily undertakes, after the time for completing the contract has expired, and without authority of the owner, to remedy the trouble, especially where the work or material is trivial, such work does not extend the time for filing. *Sulcer Boat Machine Co. v. Rushville Water Co.* (Ind. App.), 62 N. E., 649; *Hartley v. Richardson*, 91 Me., 424, 40 Atl., 336; *Lippert v. Lassar* (Cal.), 33 Pac., 797. Particularly is this the case where the contractor performs the work, not because of any obligation to do so, but for the sole purpose of enabling him to extend the time for giving the statutory notice. *Wolfing-Luring Lumber Co. v. Mosely*, 152 Ky., 701. Where, however, the service or material is not only required by the contract, but is furnished at the request of the owner, it will extend the time for claiming a lien, or will revive an expired lien as to the contract theretofore substantially completed. *St. Louis National Stock Yards v. O'Reilly*, 85 Ill., 546; *Holden v. Winslow*, 18 Pa., 160; *Nichols v.*

Culver, 51 Conn., 177; Home Brewing Co. v. Johnson, 41 Ind. App., 44, 83 N. E., 358; McLean v. Wiley, 176 Mass., 233, 57 N. E., 347; Miller v. Wilkinson, 167 Mass., 136, 44 N. E., 1083; Monaghan v. Putney, 161 Mass., 338, 37 N. E., 171; Hubbard v. Brown, 8 Allen, 590; E. R. Darlington Lumber Co. v. J. T. Smith Bldg. Co., 134 Mo. App., 316, 114 S. W., 77; Federal Trust Co. v. Guigues, 76 N. J. Eq., 495, 74 Atl., 652; Stidger v. McPhee, 15 Colo. App., 252, 62 Pac., 332; McIntyre v. Tautner, 63 Cal., 429; Whitcomb v. Roll (Ind. App.), 81 N. E., 106; Gordon Hardware Co. v. San Francisco & S. R. Co., 86 Cal., 620, 25 Pac., 125; Bruce v. Berg, 8 Mo. App., 204; General Fire Extinguisher Co. v. Schwartz Bros. Commission Co., 165 Mo., 171, 65 S. W., 318; Worthen v. Cleaveland, 129 Mass., 570. Here the work in question, though called extra, was required by the specifications, and was performed because the owner's authorized agent directed the sub-contractor to do so. Under the rules above announced, the time for filing the statutory notice was thereby extended.

(e) The next question to be considered is the propriety of the court's action respecting the claim of Henry J. Schoo. The notice given by Schoo was to the effect that he had filed in the office of the Jefferson County Court a mechanics' and materialman's lien, asserted by him against the property owned by Price. The statute requires notice of the claimant's intention "to hold said property liable and the amount for which he will claim a lien." Even if it be conceded that notice of the filing of the lien was notice of Schoo's intention to hold the property liable, the notice was defective because of its failure to state the amount for which he would claim a lien. In such a case the law does not impose upon the owner the duty of examining the records in the clerk's office for the purpose of determining the amount. The notice itself must specify the amount, and where no amount is specified the notice is not sufficient. Wolfing-Luring Lumber Co. v. Mosely, 152 Ky., 701; Wright v. Monroe Lumber Co., 156 Ky., 83. After Schoo was denied a mechanics' lien he offered an amended pleading, claiming, first, a lien by equitable assignment, and, second, a personal judgment against Price because of an alleged promise by Price's architect to see that he was paid. The amended pleadings were offered to conform to the proof. The chancellor refused to permit them to

be filed on the ground that they were not sustained by the proof. The facts are these: On September 21st Collett gave Schoo an order on Meyer for \$150. At that time Collett had ceased work, and there was nothing coming to him under his contract. As an equitable assignment can be created only where there is a fund in existence belonging to the assignor, the relief on this phase of the case was properly denied. On the promise of payment made by Meyer, Schoo testifies that a day or two before the completion of the contract he asked Meyer about getting his money; whereupon Meyer said, "Go ahead and finish up, and I will see you get your money or authorize this." Meyer denied having such a conversation. On this evidence the chancellor refused to give a personal judgment against the owner, and we see no reason to disturb his finding.

On the cross-appeal of Price it is first insisted that the chancellor erred in charging Price with interest on the balance of the contract price in his hands from the date suit was filed to the date of the judgment. It is argued that this was error because Price was a mere stakeholder, and had the right under the contract to retain the money until the question of liens was adjudicated. As between Price and the lien claimants, the money in equity belonged to those who finally established their liens. As between Price and the surety company the surety company was liable to Price at the time of the filing of the action for the difference between the sum which he had in his hands and the full amount of the lien claims which were finally established. Under these circumstances the only way by which Price could relieve himself of the burden of interest was to pay the money into court. This he failed to do, and he was, therefore, properly charged with interest.

It is next insisted that Price should have been allowed his attorneys' fees against the surety company. The argument is this: The surety company guaranteed that the contract would be faithfully performed by Collett. The contract provided "that the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any liens on said premises, made obligatory in consequence of the contractor's default." The attorneys were employed to resist the liens. They succeeded in defeating liens amounting to \$1,200. It is insisted that money paid in defeating liens is in effect

money paid in discharging liens; for, if not defeated, they would have had to be discharged, and for the sum paid in their discharge the surety company would be clearly liable. It is true that this court has upheld the allowance of attorneys' fees incurred in resisting eviction where the contract indemnified the obligee "against all loss caused and damage growing out of or on account of any defect in the title." *Robertson v. Lemon*, 2 Bush, 301; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky., 271. It is also true that the same rule was followed in the case of *Southern Ry. New Co. v. Fidelity & Guaranty Co. of New York*, 26 Ky. L. R., 1220; but there the insurer engaged at its own cost and expense to conduct a trial or defense, but failed to do so. And in the case of *Allen Co. v. U. S. F. & G. Co.*, 122 Ky., 825, the court allowed a recovery on a bond for such items of special damages as the architects' commission and the expense incurred in letting the contract. Here, however, the action is based on Collett's obligation to discharge the lien, and the surety's obligation to see that this provision of the contract was faithfully performed. It is not a contract to indemnify the owner against all loss or damage by reason of the contractor's default in paying the mechanics' liens, but is a contract simply to indemnify the owner against such sums as he might be required to pay in discharging liens which the contractor should have discharged. The surety's liability is fixed by the plain terms of the bond, considered in connection with the building contract itself; and there is nothing from which it can be reasonably inferred that its liability should extend to attorneys' fees incurred in resisting mechanics' liens. Furthermore, the surety was represented by counsel in the action, who also took an active part in resisting the liens in question. We, therefore, conclude that the attorneys' fees were properly disallowed.

Judgment affirmed both on original and cross-appeals.

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### **Drake and Morton v. Rowe.**

(Decided February 10, 1915.)

#### **Appeal from Muhlenberg Circuit Court.**

1. Statute of Frauds—Subsection 4, Section 470, Kentucky Statutes.  
—Subsection 4 of Section 470, of the Kentucky Statute of Frauds,

- which provides that no action shall be brought to charge any person upon a promise to answer for the debt, default or misdoing of another, unless the promise be in writing and signed by the party to be charged therewith, applies to actions and not to defenses.
2. Statute of Frauds.—The Statute of Frauds does not make oral contracts to answer for the debt of another person invalid; it merely prohibits the bringing of an action upon such a promise.

JONSON, WICKLIFFE & JONSON for appellants.

HUBERT MEREDITH and DOYLE WILLIS for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Reversing.**

The appellants, Drake and Morton, brought this action in equity on December 23rd, 1912, against the appellee, T. H. Rowe, to recover from Rowe the sum of \$1,086.06, which represented the unpaid portion of four notes, executed by Rowe, as principal, to the H. Herrmann Manufacturing Company, of Evansville, Indiana, hereinafter called the manufacturing company for brevity, with Drake and Morton as sureties thereon.

Upon the trial, the chancellor dismissed the petition with costs, and the plaintiffs appeal.

The four notes sued on were as follows: (1) dated August 5th, 1899, for \$800.00; (2) dated October 13th, 1899, for \$300.00; (3) dated November 27th, 1899, for \$200.00; and (4) dated January 17th, 1900, for \$200.00. The notes were executed under the following circumstances: Drake and Morton had a contract with the manufacturing company to furnish it a quantity of sawlogs to be delivered at certain designated points on Green River in Kentucky. In executing a portion of that contract Drake and Morton, with the consent of the manufacturing company, substituted Rowe in their place. By a written contract between Rowe and the manufacturing company, dated August 12th, 1899, Rowe agreed to cut and deliver to that company at Evansville, Indiana, on or before the 1st of July, 1900, all of the poplar, ash, red gum, black walnut and oak timber on 179 acres of land in Muhlenberg county, then owned by Jackson Edwards, at the prices specified in the contract. The contract contemplated that the manufacturing company would advance money to Rowe, as the work progressed, all advancements to be treated as partial payments for the timber.

Upon Rowe's part, his contract contemplated and required that he should buy and pay for the Jackson Edwards land. It was estimated that the land was worth \$700.00, and that the timber upon said land was worth \$800.00. The \$800.00 called for by the first note of August 5th, 1899, and the \$300.00 called for by the second note, dated October 13th, 1899, were advanced to Rowe by the manufacturing company, upon the credit of Drake and Morton, who were sureties upon said notes. Rowe used the \$800.00 realized upon the first note in making the cash payment upon the Edwards land, and raised the remaining \$700.00 upon two lien notes, one for \$500.00 and the other for \$200.00, both of which were signed by Rowe, as principal, and by Drake alone, as surety. These two last named notes were discounted to the First National Bank of Greenville, Kentucky, and the proceeds were paid to Edwards in full satisfaction of his purchase money, which was \$1,500.00. The \$300.00 realized upon the second note of October 13th, 1899, was received by Rowe from the manufacturing company, and used by him in cutting and marketing the timber.

After having worked eight or nine months upon his contract, Rowe, on account of family afflictions, sold his timber contract with the manufacturing company to his brother-in-law, B. F. Hill, for \$50.00; and by his deed, dated July 17th, 1900, Rowe conveyed to Hill the Edwards tract of land, upon which there remained a lien for the unpaid purchase money of \$700.00, with interest.

Hill assumed the contract and had made some progress with it, when, by a sudden "run-out," or flood, in Green River, all the logs which Rowe and Hill had hauled to the banks of Green River, and were undelivered, floated down the river and were lost beyond recovery, except a few that were caught and delivered to the manufacturing company at Evansville. Hill did no further work under the contract.

Shortly thereafter, on August 24th, 1900, the manufacturing company made out a statement against T. H. Rowe, showing that it had advanced to him upon the four notes first above mentioned and for other purposes, under the timber contract, money aggregating \$1,786.86, upon which they gave Rowe a credit for logs delivered, amounting to \$700.80, leaving a balance of \$1,086.06 due the company from Rowe. The manufacturing company required Drake and Morton to pay or secure this amount,

although \$286.86 thereof was not included in the four notes above mentioned.

In addition to this amount, Drake and Morton owed the manufacturing company between four and five thousand dollars upon other transactions, and, in closing the accounts, they gave their obligation, secured by mortgage, for the entire indebtedness. Subsequently, however, either in the spirit of charity, or in the exercise of a liberal business policy, the manufacturing company discounted Drake and Morton's account by deducting 32½ per cent. from the face thereof. So, instead of paying \$1,086.06 upon the Rowe account, Drake and Morton paid only \$733.09.

As Drake was bound as surety for the lien notes for \$700.00 held by the First National Bank of Greenville, and the timber had been cut from the Edwards land and lost, Hill conveyed the land to Drake, on October 19th, 1900, in consideration of Drake's agreement to pay the lien thereon, which then amounted to \$780.00.

This closed the land transaction which was between Drake and Rowe, and subsequently between Drake and Hill. Morton had nothing to do with it.

As above indicated, the firm of Drake and Morton brought this suit on December 23rd, 1912, upon the four notes which the partners Drake and Morton paid as sureties for Rowe.

In his answer, Rowe admitted he received the money, amounting to \$1,100.00, upon the first two notes; he denied, however, that he signed either of the other two notes or that he received any of the proceeds thereof. By the fifth paragraph of his answer, Rowe set forth the contract of July 17th, 1900, between himself and Hill whereby Hill was substituted in Rowe's place under the contract with the manufacturing company; and he alleged that this was done not only with the consent and approval of Drake and Morton, but that, in consideration of Rowe's conveying the land to Hill, Drake and Morton agreed to pay the notes Rowe had given to the manufacturing company, and to release Rowe from all liability thereon. By the sixth paragraph of his answer Rowe set up the contract wherein Hill had sold and transferred the land to Drake, and alleged that Drake agreed with Hill that if Hill would convey the land to Drake, Drake would pay the four notes sued on, and that the transfer of the land would be accepted by him in full and com-

plete settlement of all the debts which Rowe owed the manufacturing company.

The court overruled the demurrers to the fifth and sixth paragraphs, and to the answer as a whole. Upon these issues the case was tried, with the result above indicated.

For a reversal it is insisted, first, that the demurrers to the fifth and sixth paragraphs of the answer should have been sustained, upon the idea that the contracts therein relied upon being in parol, were contracts to answer for the debt of another person, and were, therefore, within Sub-section 4 of Section 470 of the Kentucky Statutes, generally known as the Statute of Frauds.

That statute provides:

“No action shall be *brought* to charge any person \* \* \* upon a promise to answer for the debt, default or misdoing of another \* \* \* unless the promise \* \* \* be in writing and signed by the party to be charged therewith, or by his authorized agent.”

Appellant's contention involves a misconception of the meaning and effect of the statute relied on, since it applies to actions and not to defenses; and the defendant's plea went to the defense and not to the cause of action.

The statute does not make oral contracts to answer for the debt of another person invalid; it merely prohibits the bringing of an action upon such a promise. The *Aultman & Taylor Co. v. Meade*, 121 Ky., 241, 123 Am. St. R., 193, and *Louisville Banking Co. v. Buchanan*, 117 Ky., 975, are, in principle, decisive of this question. The defenses presented by the fifth and sixth paragraphs of the answer were not precluded by the statutes, and the demurrers thereto were properly overruled.

But, upon the merits of the defenses presented in the fifth and sixth paragraphs of the answer, the weight of the evidence is with Drake and Morton. In substance, it appears that Rowe and Hill saw Drake, who was the active partner in this business, and told him their purpose of substituting Hill for Rowe under the first contract, and that Drake said he had no objection to it, but that he could not make the agreement to substitute Hill for Rowe, because Rowe's agreement was direct with the manufacturing company. Neither Rowe nor Hill says Drake made the agreement relied upon in the answer; the most they say is that Drake merely said he



had no objection to their plan, and gave the very good reason above indicated for his refusal to agree to it. The contract was between Rowe and the manufacturing company; not between Rowe and Drake and Morton.

As to the second contract, whereby Hill transferred the land to Drake, there is no material difference between the witnesses. When the land was originally bought from Edwards it was estimated the timber was worth \$800.00, and the land \$700.00. The timber, in the meantime, had been cut and there still remained the unpaid purchase money of \$780.00; and, as Drake was surety for that money, he insisted upon some arrangement by which he could be secured. To effect that purpose, Hill conveyed the land to Drake, who agreed to pay the unpaid purchase money, which was more than the estimated value of the land, after the timber had been cut. This settled the land transaction and put it out of the case. It was a separate and distinct transaction, and has no bearing upon the merits of this suit, which is brought solely upon the four notes first above specified.

The proof relating to the third and fourth notes is not sufficient to fix upon Rowe any liability for those notes. Rowe admits he signed the first two notes for \$800.00 and \$300.00, respectively, and received the proceeds thereof, but he expressly denies that he signed either the third or fourth note; and he further says he did not receive any part of the proceeds of the third or fourth notes.

Furthermore, Drake, who was the managing partner in this transaction, admits Rowe did not sign the third and fourth notes, but says Rowe authorized Hill to sign them, and that Hill did so; and Drake further says Rowe admitted he had authorized Hill to sign the notes. Rowe denies both statements, and Hill also denies that he signed the notes for Rowe, or that he had any authority to do so. It is true Pannell says Hill told him that Rowe had authorized Hill to sign the notes; but Hill contradicts Pannell, and the testimony, if true, would not be competent against Rowe. So, under the proof, it must be said the appellants have failed to make out their case against Rowe upon the third and fourth notes.

The appellants' right to recover, therefore, must be limited to the first two notes for \$800.00 and \$300.00, respectively, aggregating \$1,100.00. The third and fourth notes, aggregating \$400.00, being excluded from the total

bill of \$1,786.86, which Rowe owed the manufacturing company, leaves a gross indebtedness by Rowe of \$1,386.86; and deducting from this the credit of \$700.80, there remains a net balance of \$686.06. From this net balance there should be deducted the credit of 32½ per cent., amounting to \$222.80, which was not paid by Drake and Morton, thus leaving a final net balance of \$463.25, for which appellants should have judgment, with interest thereon from August 24th, 1900, the date of its payment by appellants to the manufacturing company.

The judgment is reversed, with instructions to the circuit court to enter a judgment as above indicated.

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### **Louisville Railway Company v. Kritzky.**

(Decided February 10, 1915.)

#### **Appeal from Jefferson Circuit Court (Common Pleas Branch, Third Division).**

1. **Evidence—Mercantile Books—When Incompetent.**—In an action to recover damages of a street railway company for injuries received by the plaintiff in attempting to board one of its cars, the driver of an ice cream wagon, who testified as to the accident as a witness for the defendant, cannot be contradicted or his evidence impeached by the books of the ice cream manufactory for which he was driving, which were introduced for the purpose of showing that they contained no orders for ice cream requiring its delivery by the witness at or west of the place of the accident on the morning of its occurrence.
2. **Evidence—Reasons for Exclusion of Such Evidence.**—The introduction of the books in the manner and for the purpose indicated was inadmissible because: (1) They were not shown to have been properly kept; (2) Mercantile books can only be admitted as affirmative evidence and are never admissible to establish a negative proposition.
3. **New Trial—Incompetent Evidence—Books.**—The prejudicial effect resulting to the defendant from the introduction of the books in question being manifest, the refusal of the circuit court to grant it a new trial by reason thereof requires the reversal of the judgment.

**FRANK P. STRAUS, HOWARD B. LEE and EUGENE R. ATTKISON** for appellant.

**W. PRATT DALE and EDWARDS, OGDEN & PEAK** for appellee.

## OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This is an appeal from a judgment entered upon a verdict returned in the Jefferson Circuit Court, Common Please Branch, Third Division, whereby the appellee, William N. Kritzky, was awarded \$2,000.00 damages against the appellant, Louisville Railway Company, for personal injuries received, as alleged, by the negligence of its motorman in operating one of its cars.

According to appellee's own testimony, on the morning of the 26th of April, 1912, as he approached the corner of Nineteenth and Chestnut streets in the city of Louisville, on his way to work, he attempted to get upon one of appellant's street cars as it passed him at that point; that after signalling the motorman on the car and it had slowed down, apparently for the purpose of taking on passengers, he took hold of the car to board it and had placed one foot on the lower step thereof when it started with a sudden jerk and threw him into the street and to the ground, by which he was painfully and, to some extent at least, permanently injured.

According to the testimony of the motorman in charge of the car which appellee attempted to board, it was not at the time of the accident being operated for the transportation of passengers, but was being taken to a car barn for repairs; he not being in the company's uniform at the time, but dressed in overalls; that as the car approached Nineteenth Street and the point at which appellee was standing it was going at rate of ten or twelve miles an hour, and did not reduce its speed or slow down for the purpose of taking him on as a passenger; that he did not know that the appellee had attempted to board it or been thrown to the street until the car reached Eighteenth Street.

The only witnesses introduced in appellee's behalf, besides himself, were Thomas A. Brocar and Lee Pfeiffer, both of whom testified that they had been passed by the car and were within 150 or 200 feet of the appellee at the time he was injured; that they saw him standing in the street at the proper place to board the car and also saw him attempt to get on it, in doing which he was thrown to the ground; but neither of them undertook to tell the rate of speed at which the car was then running or whether or not it slowed up in approaching appellee.

Appellant introduced in its behalf, in addition to the motorman, one John Stahle, Jr., who testified that he

was driving a delivery wagon for the ice cream manufactory of George Cuscaden at the time of the accident and was between Nineteenth and Twentieth streets on Chestnut going in the same direction as the car, and was about forty or fifty feet behind it at the time appellee attempted to board it and was thrown to the ground; that the car did not slow up for appellee, but passed him going at a rate of ten or twelve miles an hour.

Appellee introduced in rebuttal, Harry Cuscaden, a son of the proprietor of the ice cream manufactory, who testified that the books of the ice cream manufactory showed all orders received for ice cream on the day of the accident; that they never had to deliver ice cream as early in the morning as the accident happened, 7:30 o'clock, west of Tenth and Broadway, unless there was some special order for it; that the books kept at the ice cream manufactory in the regular course of business showed all orders received for ice cream, and that they showed no order for the delivery of ice cream west of Tenth and Broadway on the morning of the accident. The witness produced and had with him the books referred to. In order that the testimony of this witness may be fully understood we quote the following questions and answers on his examination in chief:

“Q. In the month of April, 1912, were you in charge of the delivery department of the Cuscaden business? A. Yes sir. Q. Did you have in your employ, at that time, a young man by the name of John Stahle, Junior? A. I could not say for sure, he has worked there a number of different times, but I can't say for sure whether he was in the employ at that time, because my father does not keep any records of the names. Q. Well, on the mornings of the 26th and 27th of April, 1912, I want you to tell the jury whether there were any orders to be delivered in the west end and at what hours? A. Well, the only way I could tell you exactly, by going to the books. The court: Go to the books. Mr. Attkisson: I object to any books unless he kept them. Q. Were those books kept under your supervision? A. No sir, they were not. The books are simply day journals and there are at least a half a dozen or eight people in the office and every one has a right to enter orders on the day journal. Q. Were all the orders made there in your office? A. Yes sir. The court: The books are kept in the regular course of business of your father? A. Yes sir. The court: I think you can refer to them. To which ruling of the court the de-

fendant by counsel excepts. Mr. Attkisson: There is another reason here—books are never admissible to prove the negative of a proposition. The court: We will see what the books have to say this time. Q. On the 26th and 27th, I want to know, first, if there was any order at all to be delivered to Sixteenth and Chestnut, or on Chestnut between Sixteenth and Seventeenth Street? A. Not on the 27th there was not; no sir, nothing in the neighborhood of Sixteenth and Chestnut on either day. Q. Now, was there any order to be delivered that would carry one of your wagons in the neighborhood of Nineteenth and Chestnut? The court: West of Nineteenth. Q. Yes, west of Nineteenth Street, on either the 26th or 27th of April, by half past seven in the morning, April, 1912? A. No sir, not unless there would have been some special order and the books show there was no special order at that early hour. The wagon never has anything below Tenth and Broadway depot, early morning train orders, at that hour in the morning. Q. If there had been any special order to carry a wagon west of Nineteenth Street, on Chestnut, would your books show it? A Yes sir. Q. Do they show it? A. No sir. Q. Then, there was none? A. No sir."

Although additional grounds for a new trial were filed in the court below by appellant, it asks the reversal of the judgment appealed from upon the single ground that the books of the Cuscaden ice cream manufactory, together with the accompanying testimony of Harry Cuscaden, introduced in rebuttal by appellee on the trial, for the purpose of contradicting appellant's witness, John Stahle, Jr., were incompetent and so prejudicial to its substantial rights, as to entitle it to the new trial moved for in the circuit court.

This contention must prevail. In the first place, it is manifest, both from the books and Harry Cuscaden's testimony, that they were simply day journals and inaccurately kept, because the entries, particularly those of the day on which appellee was injured, were made by six or eight different persons employed in the office of the Cuscaden ice cream manufactory, the handwriting of none of whom was identified, nor was it made to appear that the entries of ice cream orders were made as of the time or days they were received, or that those who made them had personal knowledge of the facts entered or recorded. At most the books were simply memorandum books kept in a haphazard manner, and the entries

had no relation to dealings between litigants, neither party to this action having any connection with the matters therein recorded. For the reasons mentioned, if no other were apparent, the books in question were incompetent as evidence. *C., N. O. & T. P. R. Co. v. Smith & Johnson*, 155 Ky., 490.

In the second place, mercantile books may be admitted as affirmative evidence but they are not admissible to establish a negative proposition. In *Lawhorn v. Carter*, etc., 11 Bush, 7, the question of evidence under consideration was passed on. In the opinion it is said:

"The plaintiff when testifying in his own behalf was allowed to state that the books of the firm had been kept by his deceased partner and the clerks of the firm, all of whom were dead, and that they were correctly kept and had been found by the witness in settling the firm business to be correct, and then to state that they contained no entry showing that the defendant had delivered tobacco to the firm, as claimed by him; and so much of the books as related to the defendant's account with the firm was allowed to be read to the jury as evidence, and the account as read is copied into the record. The account on its face shows that it does not contain the original entries of the items appearing on it, and the books were for that reason incompetent. (1 *Greenleaf on Evidence*, Secs. 117, 118.) But they were inadmissible on other grounds. Mercantile books can only be admitted as affirmative evidence, and are never admissible to establish a negative proposition. It was accordingly held in an action by a laborer against his employer for wages that the time book of the employer, kept in tabular form, in which the days the plaintiff worked were set down, was not admissible in evidence to show that the plaintiff did not work on certain days, by the omission of the defendant to give credit for those days; and the reason given was that it was a book of credit, and not of charges. (*Moore v. Potter*, 4 Gray, 292.) The books, as well as the testimony of the appellee in reference to them and what they contained or did not contain, were incompetent."

A yet more recent authority in point is furnished by the case of *Vandyke v. M. N. O. & C. Packet Co.*, 24 R. 1283. The action was instituted by a roustabout to recover damages of the owner of a steamboat for negligence in permitting a trap door to remain open, through which the plaintiff fell and sustained serious injury. Charles McKenzie, a witness for the plaintiff, testified that he was

a roustabout on the boat at the time of the accident and that the plaintiff's injuries had been sustained in the manner claimed by him. The defendant was permitted to introduce in evidence a record kept by the shipping clerk to prove that McKenzie's name was not among the list of roustabouts on the boat at the time of the accident. In holding this evidence incompetent the court said:

"The defendant then introduced the captain of the boat, and asked him if McKenzie was on the boat on that trip. He answered that he hardly thought he was. The defendant then introduced the record of the boat kept by the shipping clerk, who was not introduced as a witness, and showed by it that McKenzie's name did not appear in the list of roustabouts kept by him on that trip. The clerk who was introduced was not present when the second clerk took the names, but testified that the latter tried to get them all. He also stated that sometimes these roustabouts took different names. This proof failed to show that the record was correctly kept, and it should not have been admitted. On the contrary, it tended strongly to show that though the second clerk tried to get all the names, he might not have done so. There is another objection to this evidence. Books of this kind are usually admitted only as affirmative evidence, and not to establish a negative proposition. Thus it has been held that the time book of the employer kept in tabular form, in which the days the hands worked were set down, was not admissible in evidence to show that the plaintiff did not work on certain days. (*Lawhorn v. Carter*, 74 Ky., 7; *Moore v. Potter*, 4 Gray, 292; *Mattocks v. Lyman*, 46 Am. Dec., 138.)"

An examination of the authorities relied on by appellee will show that they do not conflict with the principle announced by the authorities *supra*. They relate to controversies or transactions between litigants and have no bearing on a state of case like that here presented.

There can be no doubt of the prejudicial effect of the evidence furnished by the books referred to and the statements of Harry Cuscaden. The purpose of it all was to show that appellant's witness, Stahle, who alone corroborated its motorman as to the manner of appellee's receiving his injuries, did not see the accident and was not in the vicinity when it occurred, and its effect upon the jury was necessarily very damaging to appellant.

So forcibly was it used by appellee's counsel in his argument to the jury, that upon the conclusion of the argument counsel for appellant moved to discharge the jury, filing in support of the motion the affidavit of T. J. Check, one of its employes, setting forth the denunciatory language used by appellee's counsel in referring to the witness Stahle, and the use made by him of the books of the ice cream company in attacking Stahle's credibility.

We think it patent that the introduction of the incompetent evidence in question prevented appellant from obtaining an impartial trial of his case; and because of the error of the circuit court in admitting this evidence and its further error in refusing appellant a new trial by reason thereof, the judgment is reversed and cause remanded with directions to that court to grant it a new trial in conformity to the opinion.

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### **Sumrall's Committee v. Commonwealth.**

(Decided February 10, 1915.)

#### **Appeal from Boyle Circuit Court.**

1. **Domicile—How Changed—Insane Person Incapable of Changing Domicile.**—In order to enable one to change his legal residence or domicile or acquire a new domicile, there must be: (1) Freedom of choice; (2) bodily presence in the chosen locality; (3) an intention to remain there permanently. An insane person, being incapable of either choice or intention, cannot legally change his domicile.
2. **Domicile—Of Insane Person—Where Located—Situs of Property of for Taxation—Powers of Committee.**—Where an insane person, residing in this State until he became insane, was sent by his father to an asylum in another State for care and treatment, and there kept until the father's death two years later, following which, under an inquest of the Boyle County Court, he was found by a verdict of a jury and judgment of the court to be a lunatic and a committee appointed to take charge of his person and estate, the fact that the committee allowed him to remain in the asylum of another State where he had previously been maintained by the father, did not have the legal effect to fix the lunatic's domicile in such other State or remove it from Kentucky. Such domicile continued and yet remains in Boyle County, Kentucky, where the committee must statelily make settlements of the estate and list it for taxation and pay taxes thereon. The committee cannot by its mere election fix the lunatic's legal domicile in another State. It may have the power to change the



lunatic's municipal domicile, that is, from one place to another within this State, but it is without power to change his national or quasi-national domicile by removing it from this State to another State.

WM. L. WHITTINGHILL for appellant.

HENRY JACKSON for appellee.

**OPINION OF THE COURT BY JUDGE SETTLE—Affirming.**

This appeal grew out of the action of the Board of Tax Supervisors of Boyle County, in listing and assessing for taxation for the year 1914, property, alleged to have been omitted, belonging to William L. Sumrall, a lunatic, held by appellant, Fidelity & Columbia Trust Company, as his committee; the latter having appealed from the action of the board of supervisors to the quarterly court, thence to the circuit court; and from the judgment of the latter court, which was also adverse to its contention, to this court. The several appeals thus prosecuted by the committee are allowed by Section 4128, Kentucky Statutes, which provides:

“Any informality or irregularity in the execution of their duties as supervisors, and any failure of duty on their part, shall not render any assessment invalid. But any taxpayer feeling himself aggrieved by the action of said board of supervisors, may appeal to the quarterly court within thirty days after the final adjournment of said board, by filing with the judge of said court a certified copy, under the hand of the clerk of said board, of the action of said board. ‘And as to further appeals, he shall have the same rights as are now allowed by law in civil cases. It shall be the duty of the county attorney to appear and defend for the board.’ ”

In its answer or written statement filed in the courts below appellant resisted the listing of the property in its hands belonging to the lunatic, William L. Sumrall, for taxation for the year 1914, upon the ground that his residence or domicile had, prior to September 1, 1913—the date as of which property subject to taxation became assessable in this State—become fixed in the state of Maryland. The quarterly and circuit courts sustained a demurrer to the pleading in question, thereby holding the property of the lunatic subject to taxation in Boyle County for State and county purposes, and such was the judgment entered in each court.

The admitted facts show that William L. Sumrall is forty-five years of age and was born and reared in Boyle County, where he resided until 1905, when he became insane and was for the purpose of confinement and treatment sent by his father to an asylum for the insane in the state of Maryland. In January, 1907, his father, J. K. Sumrall, died, and in September of that year William L. Sumrall was by verdict of a jury and judgment of the Boyle County Court formally found to be and adjudged insane. At the same time appellant by appointment of that court duly qualified as his committee, by virtue of which it took charge of the lunatic's estate. In 1911 the Sumrall farm, situated in Boyle County near Danville, was by decree of the Boyle Circuit Court sold and the proceeds of sale distributed to the three children of J. K. Sumrall; the appellant receiving as committee the share of William L. Sumrall. J. K. Sumrall lived upon the farm in question until his death and there reared his children. William L. Sumrall's home was with his father upon this farm until he was sent by the latter to the insane asylum in Maryland in 1905. The appellant, as committee, paid taxes in Boyle County upon the estate of its ward from the time of its appointment and qualification as committee down to the year 1914.

In view of the foregoing undisputed facts it is manifest that William L. Sumrall's domicile, both of origin and selection, was and continued to be in Boyle County down to the time he became insane; that he has never recovered from his insanity and is absent from Kentucky through no choice of his own; from which it would seem to follow that his domicile continues to be and is now in Boyle County. This is certainly true unless appellant, as committee, can, by its mere election, declare him a resident of the state of Maryland, for the purpose of defeating the State of Kentucky and Boyle County of its right to assess and tax the ward's property in Boyle County.

It is not claimed in the pleading filed by appellant that its ward's property was taxed or assessed for taxation for the year 1914, or at any time, in the state of Maryland, or that it is subject to taxation in that state; but simply that it cannot be taxed in this State because of the ward's residence in the state of Maryland. Appellant is a Kentucky corporation, its place of business being in Louisville, Kentucky. When it accepted the appointment and qualified as committee for William L.

Sumrall in 1907, though he was then insane and confined in an asylum of another state, he was domiciled in Kentucky. If such had not been the fact the Boyle County Court would have had no jurisdiction to appoint the committee, nor appellant the right to accept the trust. Appellant must statedly make settlement of its accounts as committee in the Boyle County Court, and if it were to relinquish the trust its resignation would have to be made to the Boyle County Court, or, if it had to be sued for a violation of the trust, the action would have to be brought in the Boyle Circuit Court.

From the appellant's appointment as committee to the present time the status of the ward and his estate has remained unchanged, and there is no claim and cannot be, that the insane ward fixed his domicile in Maryland, but asserted only that appellant, before September 1, 1913, elected to fix the ward's domicile in that state. In order to enable one of sound mind to change his domicile or acquire a new one, there must be: (1) Freedom of choice; (2) bodily presence in the chosen locality; (3) an intention to remain there permanently. But an insane person is incapable of exercising either choice or intention, nor can these twin elements essential to the acquisition of a new domicile in another state be supplied by the committee of an insane person.

An interesting discussion of the question under consideration will be found in Minor's "Conflict of Laws," on page 107 of which it is said:

"The determination of a lunatic's domicile would seem to hinge upon the question whether there has been an adjudication of lunacy, or rather whether his person has been actually committed to the custody and control of a legal guardian or committee."

In further dealing with the subject, the author on page 108 says:

"The true principle, therefore, would seem to be that a lunatic, whose person has been placed under the control of a guardian or committee, is *prima facie* incompetent to establish a domicile in another state, but, upon satisfactory proof of mental capacity supervening such domicile may be recognized."

As previously intimated, there is here no claim that a Maryland domicile was acquired by act of the insane ward. As a matter of law, and in point of fact, the latter's domicile, both of origin and selection, being, at the time his insanity intervened, in Boyle County, Ken-

tucky, it is yet there and cannot be in Maryland, unless the *ipsi dixit* of appellant that it has changed it to Maryland shall be allowed to have the effect of fixing it there. This aspect of the question is also considered by Mr. Minor on pages 108-9, "Conflict of Laws," where it is said:

"The question remains, what is the locality of the lunatic's domicile when he is himself too insane to choose one? Shall the guardian or committee have power to change it, or must it remain unalterably where it was when the disability was first incurred? This case is closely analogous to that of the guardian's power to change an infant ward's domicile, already discussed. As to the lunatic's municipal domicile, it seems that the guardian has the power, but not so with respect to his national or quasi-national domicile. His latter domicile will remain unchanged regardless of the place of his actual residence. He will retain the domicile he possessed before he became insane, upon the principle that a domicile once acquired is retained until another is gained."

It will be observed that the text last quoted draws a distinction between a municipal domicile and a national or quasi-national domicile. We may concede that appellant as committee has, as claimed by it, all the power that a guardian possesses with respect to the control of the person and estate of his ward, and that by virtue of such power it may change, within the bounds of the State, the municipal or county domicile of the lunatic of whose person and estate it is the committee, but we do not give our assent to the proposition that a guardian or committee has the power by the right of election to change the domicile of the ward from this State to another State. Obviously, a guardian who is likewise the parent of his ward can change the national domicile of the latter, for the home of the parent is in law that of the infant. Whether the parent who is also guardian of his infant child can, after changing his domicile and that of the infant ward to another state, continue to act in the state of the new domicile as the latter's guardian by virtue of his appointment and qualification as such in this State, is a question open to grave doubt. At any rate, we have been referred to no case so holding. The right of the parent guardian to change the ward's domicile to another state, although not necessary to the decision of the case, seems to have been so held by us in *Boyd's Ex'r. v. Common-*

wealth, 149 Ky., 764, a case strongly relied on in the brief of appellant's counsel. In the opinion it is said:

"The place of one's birth is his domicile of origin; during his minority, he is without power to change this, though it may be changed for him by his parents, guardian, or the person having legal custody of him. After his majority, he is free to change it, and when so changed the new domicile is termed domicile of choice."

The cases, *City of Louisville v. Sherley*, 80 Ky., 71; *Mills Guardian v. Hopkinsville*, 11 S. W., 776, also relied on by appellant's counsel, do not militate against the conclusion we have expressed, as they apply to municipal domicile alone and do not, therefore, bear upon the question of the committee's right to change the national domicile of the ward. The brief of appellant's counsel seems to take no account whatever of the distinction between the within-state or municipal domicile, and the out-of-state, national or quasi-national domicile, or to realize the fact that in this jurisdiction the right of the committee to change the domicile of the ward by removing it to another state has never been recognized.

We are unable to give our assent to the interpretation given by appellant's counsel to Section 4023, Kentucky Statutes. In our opinion the word "resides" as used in that section means a domicile outside the State, and it could not have been the intention of the legislature that every time the real or beneficial owner of intangible personal property took up his residence temporarily outside of this State that the personal representative, trustee, committee or agent in this State should hold the trust property exempt from taxation therein. The distinction between legal and actual residence is discussed and well stated in *Boyd's Ex'r. v. Commonwealth*, *supra*, and *Tipton v. Tipton*, 87 Ky., 243. A reading of all that part of Section 4023 bearing upon the exemption from taxation of intangible personal property owned by residents out of the State, but held for them within the State, will better explain our meaning. It is as follows:

"*Provided, however*, That an administrator, executor, trustee, committee, curator or agent residing in the State shall not be liable for taxes on intangible personal property, where the real or beneficial owner of such intangible personal property, held by them or any of them, resides outside of the State; but this exemption shall not apply in the case of an executor or administrator in the exercise of his office as personal representative while the

estate of a deceased person is in process of settlement and before the share of the non-resident legatee or beneficiary is set apart to him, or before said legatee is entitled to be paid his share. \* \* \*

The meaning of the above provision is that when the intangible personalty of the beneficiary passes to him and its situs for the purpose of taxation becomes and is at his legal residence or domicile in another State, a representative or agent in Kentucky though in possession thereof shall not be liable for a tax thereon. Such was the construction given the section, *supra*, in *City of Henderson v. Barrett's Ex'r., etc.*, 152 Ky., 648, and it was therein held that the legislature has the power to fix the situs of intangible personal property for the purpose of taxation, and neither Section 4020, Kentucky Statutes, fixing the situs of such property at the residence of the real or beneficial owner, and not at the residence of the fiduciary or agent having custody or possession of same, nor Section 4023, providing that an administrator, executor, trustee, committee, curator or agent residing in the State, shall not be liable for taxes on intangible personal property where the real or beneficial owner of such intangible personal property held by them or any of them reside outside of the State, is unconstitutional.

In the instant case appellant, as committee of William L. Sumrall, cannot claim that his estate in its hands is, by virtue of Section 4023, Kentucky Statutes, exempt from taxation in this State and in Boyle County because the latter, being confined in an insane asylum in Maryland, may for that reason be said to have an actual residence outside of Kentucky; for his legal residence or domicile, as a matter of law, is in Kentucky and has remained unchanged regardless of the place of his confinement or actual residence. The rule of law making Boyle County, Kentucky his legal residence or domicile, cannot be changed by an election on the part of his committee to fix it in Maryland or elsewhere outside of Kentucky.

As the circuit court did not err in sustaining the demurrer to the appellant's answer or statement of its defense, the judgment is affirmed.

**Niagara Fire Insurance Company v. Layne.**

(Decided February 11, 1915.)

**Appeal from Pike Circuit Court.**

1. **Insurance—Assignment or Other Transfer of Policy—Effect of.**—The assignment of a policy of fire insurance by consent of the insurer creates a new and independent contract equivalent to the original issue of a policy by the insurer direct to the assignee.
2. **Insurance—Avoidance for Misrepresentation—Grounds in General—Statutory Provisions—Effect of Misrepresentations.**—Where one applying for insurance makes answer to inquiries or makes statements voluntarily, if the fact be material and the answer or statement untrue, Section 639 Kentucky Statutes applies, and this court has consistently held that the policy is avoided whether the applicant knew the answer or statement to be untrue or not and regardless of any fraudulent intent on the part of the insured. But where no inquiry is made and answered concerning encumbrances and no voluntary statement in regard thereto is made by the applicant, an avoidance of the policy will not be declared unless the insured has fraudulently failed to disclose the fact of an encumbrance material to the risk assumed by the company.
3. **Insurance—Avoidance for Misrepresentation—Grounds in General—Fraudulent Concealment.**—Failure to disclose the existence of a lien material to the risk is fraudulent when the insured has knowledge of the encumbrance and the facts are such that an ordinarily prudent person would have known that the existence of the lien was material to the risk.
4. **Insurance—Avoidance for Misrepresentation—Grounds in General—Materiality.**—An encumbrance (or other fact) is material to the risk when, with a knowledge of the truth, an insurer acting in accordance with the usual practice or custom among insurance companies would not have issued the policy.
5. **Insurance—Actions on Policies—Questions for the Jury.**—The question of the materiality of an encumbrance on the insured property is ordinarily one for the jury.
6. **Insurance—Insurable Interest—Building on Lands of Another Than Insured.**—Where one has erected a building on the lands of another, in the absence of an agreement to that effect, he has no right to remove it; and his right even to occupy such building having ceased, he had no insurable interest therein.
7. **Insurance—The Contract—Construction and Operation—Entire and Severable Contracts.**—Where no inquiry is made of the insured and his failure to disclose his want of insurable interest in one item of property covered by the policy was fraudulent, and the want of insurable interest in the one item was material to the risk on another item covered by the policy, the entire policy will be avoided.
8. **Insurance—Notice and Proof of Loss.**—Failure to furnish proofs of loss within the time required by the policy will not defeat an

action thereon; but the action cannot be maintained until proofs of loss are furnished; and if those furnished are insufficient and it is the purpose of the insurer to defend an action upon that ground, it is incumbent upon the insurer to state to the insured clearly the grounds of its objections to the sufficiency of the proofs of loss as submitted.

HAGER & STEWART and JAMES SOWARD for appellant.

J. J. MOORE for appellee.

OPINION OF THE COURT BY JUDGE HANNAH—Reversing.

On November 2, 1911, the Niagara Fire Insurance Company by its standard form policy, insured M. B. Collinsworth for the period of one year, against loss or damage by fire in the amount of one hundred and fifty dollars on a building and eight hundred and fifty dollars on a stock of general merchandise therein stored, on Johns Creek in Pike county.

On February 6, 1912, Collinsworth sold the merchandise to appellee Layne for the sum of two thousand and fifty dollars, Layne executing to Collinsworth a mortgage on the merchandise and on a certain tract of land in Pike county, to secure the payment of the unpaid portion of the purchase price thereof, eighteen hundred and thirty-three dollars.

On February 15, 1912, at the solicitation and request of Collinsworth, the agent of the insurance company at Ashland in Boyd county, endorsed upon the policy the company's consent to the transfer of the policy by Collinsworth to Layne.

The building and its contents were destroyed by fire on October 11, 1912; and the fire insurance company having declined to pay the amount of the policy, Layne sued thereon in the Pike Circuit Court, and obtained a verdict and judgment in the sum of one hundred and fifty dollars for loss of the building, and five hundred and fifty dollars for loss of the merchandise. Layne had a policy in the same amount in another company, so that the verdict was for one-half of the loss as estimated by the jury; that is, the jury found the value of the building to be three hundred dollars and of the merchandise to be eleven hundred dollars, and returned a verdict against the Niagara Fire Insurance Company for one-half of said amounts. The insurance company appeals.

1. At the outset, it may be noted that where, as in this instance, a policy is by consent of the insurer as-



signed and transferred by the original holder thereof, a new and independent contract of insurance is created equivalent to the original issue of a policy by the insurer to the assignee. *Home Insurance Company v. Allen*, 93 Ky., 270, 13 R., 95, 14 R., 161, 19 S. W., 743.

2. It is contended by appellant company that there can be no recovery for loss upon the merchandise, because it was encumbered by the mortgage above referred to at the time of the transfer of the policy to Layne. The policy contained a stipulation to the effect that if the subject of the insurance be or become encumbered by a chattel mortgage, the policy should be void. It is insisted by appellant that the fact of the encumbrance was material, that it was not known to the company's agent at the time he consented to the transfer of the policy, and that it was not communicated to the agent at that time. It is conceded by appellant that its agent made no inquiries of Collinsworth at the time he procured consent to the transfer thereof, in respect of encumbrances on the merchandise.

So that primarily, the question presented is the effect of the failure of an applicant for insurance to communicate to the insurer the fact of an encumbrance on the property sought to be insured, where no inquiry is made concerning the subject, and where the policy has a forfeiture clause similar to the one sued on.

3. Section 639, Kentucky Statutes, provides that all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; and that no misrepresentation unless material or fraudulent shall prevent a recovery on the policy.

And in *Hartford Fire Ins. Co. v. McClain*, 85 S. W., 699, 27 R., 461, it was said that this section of the statutes applies to the policy as well as to the application therefor, and that stipulations contained in the policy itself, as to title or interest, though not signed by the insured, amount to representations by the applicant of such facts. Language to the same effect is found in *Wilson v. Germania Fire Ins. Co.*, 140 Ky., 642. But in both of these cases, the question of ownership of the insured property and not an encumbrance thereon was involved, and the insured were properly permitted to recover the value of their interest in the property. *Hartford Ins. Co. v. Haas*, 87 Ky., 531; *Spalding v. Miller*, 103 Ky., 414; *American Central Ins. Co. v. Leake*, 31 Ky. L. R., 1018; *Wilson v. Germania Fire Insurance Co.*, 140 Ky., 646.

It may be conceded that if A obtains a policy of fire insurance on certain property, although he may not be asked a direct question concerning its ownership or may have made no direct representation in respect thereof, the fact of obtaining the policy itself amounts to a representation that he is the owner of the property.

But the obtaining of such policy would not amount to a representation that the property was unencumbered.

So that where no inquiry is made and answered concerning encumbrances on the property sought to be insured, and no voluntary statement is made concerning the existence or non-existence of encumbrances, there is no representation or statement in the application for the insurance which will render applicable Section 639, Kentucky Statutes.

4. Where one applying for insurance does make answer to inquiries, or makes statements voluntarily, this court has consistently held that Section 639 controls, and that if the fact be material and the answer untrue, the policy is avoided, whether the applicant knew the statement to be untrue or not and regardless of any fraud or intent to mislead or deceive the insurer. *American Aid Soc. v. Bronger*, 91 Ky., 406, 15 S. W., 1118, 11 R., 902; *Mutual Life Ins. Co. v. Thompson*, 94 Ky., 255, 22 S. W., 87, 14 R., 800; *Union Central Life Ins. Co. v. Lee*, 47 S. W., 614, 20 R., 839; *Provident v. Dees*, 120 Ky., 285, 27 R., 670, 86 S. W., 522; *Illinois Life Ins. Co. v. DeLang*, 124 Ky., 569; *Metropolitan v. Schmidt*, 29 R., 255; *Western & Southern v. Quinn*, 130 Ky., 397, 113 S. W., 456; *Briston v. Metropolitan*, 115 S. W., 785; *Provident v. Whayne*, 131 Ky., 84, 93 S. W., 1049, 29 R., 160; *National Protective Legion v. Allphine*, 141 Ky., 777; *K. of P. v. Bradley*, 141 Ky., 334; *Blenke v. Citizens Life Ins. Co.*, 145 Ky., 332, 140 S. W., 561. (Cases involving estopping knowledge upon the part of the insurance agent are of course necessarily excluded here.)

5. But where no inquiry is made and answered concerning encumbrances and no voluntary statement in regard thereto is made by the applicant for insurance, an avoidance of the policy will not be declared unless the insured has fraudulently failed to disclose the fact of an encumbrance material to the risk assumed by the company.

In *Southern California Insurance Company v. Lucas*, 15 R., 574, it was said: "An applicant for insurance, whether inquiry was made of him or not, was bound to

communicate all facts known to him and by him believed to be material, and his failure to do so must be regarded as a concealment; and it is to be presumed that he knew and believed what men of ordinary intelligence know and believe. Where a house and the sixteen acres of land upon which it was situated was worth only \$1,700 and the house was insured for \$1,000, the failure of the insured to disclose the existence of mortgage liens amounting to more than \$700 was sufficient to invalidate the policy, although no inquiry was made as to encumbrances, as the insured must have known that after satisfying the mortgage liens his interest in the insured property would not be as much as the amount for which he was insuring it."

In *Fireman's Fund Insurance Co. v. Meschendorf*, 14 R., 757, insured obtained a policy of insurance in the sum of \$1,500 on property worth \$2,200, and upon which there was a lien of \$400. No inquiry was made of him concerning encumbrances. The court in that case said, "The rule is that when no inquiries are made, the intention of the assured becomes material; and to avoid the policy it must be found not only that the matter was material but also that it was intentionally and fraudulently concealed."

In *Lancaster Insurance Co. v. Monroe*, 101 Ky., 12, 39 S. W., 434, 19 R., 204, the property was encumbered by a mortgage, the existence of which was not disclosed by the insured, no inquiries having been made of insured by the agent of the insurance company concerning encumbrances. In that case the court said:

"The case, therefore, is one where without inquiry as to any mortgage, the company accepts the money of the insured, prepares its own policy, and issues it. It seems to us that the insured has the right to assume that the company has made inquiries of him touching every material fact affecting the risk, and if he does not scrutinize the multitude of conditions and stipulations with which he finds his policy shingled over, he only risks the avoidance of his policy if it turns out that he has failed to disclose what is in fact material, and what he ought to have known to be material to the risk assumed by the company. We think this is the effect of the later decisions of this court as it is certainly the trend of the authorities generally. In *May on Insurance*, Section 207, it is said: 'Where no inquiries are made, the intention of the assured becomes material; and to avoid the policy

it must be found not only that the matter was material, but also that it was intentional and fraudulently concealed.' ”

In *Sun Mutual Insurance Company v. Crist*, 39 S. W., 837, 19 R., 305, no inquiry was made of the insured in regard to the several matters covered by stipulations in the policy, and the court reaffirmed the language above quoted from the *Monroe* case.

In *Phoenix Insurance Company v. Phillips*, 16 R., 122, no questions were asked the insured concerning the title of the land upon which the insured building was situated; and the court quoted the language of the *Meschendorf* case, *supra*: “Where no inquiries are made, the intention of the insured becomes material, and to avoid the policy it must be found not only that the matter was material but also that it was intentionally and fraudulently concealed.”

In *Continental Insurance Company v. Ford*, 140 Ky., 406, 131 S. W., 189, the evidence was conflicting as to whether inquiry had been made by the insurance agent, of the insured, concerning the existing of liens on the insured property. And following the *Monroe* case, *supra*, the court said that conceding the existence of the liens to be material to the risk assumed by the company, it was for the jury to determine whether, if insured did conceal the existence of liens, no inquiry having been made in respect thereof, such concealment was fraudulently made.

From these authorities, it will be seen that the rule in this State is that if no inquiry is made and answered concerning encumbrances, and no voluntary statement is made by insured in regard thereto, the failure to disclose the existence of encumbrances on the property sought to be insured will not be ground for an avoidance of the policy, unless (1) the insured fraudulently failed to make such disclosure, and (2) unless the encumbrance was material to the risk assumed by the company.

6. Such failure to disclose the existence of a lien material to the risk is fraudulent when the insured has knowledge of the encumbrance and the facts are such that an ordinarily prudent person would have known that the existence of the encumbrance was material to the risk. (*Ford* case, *supra*.)

7. An encumbrance (or other fact) is *material* to the risk when, with a knowledge of the truth, an insurer acting in accordance with the usual practice or custom

among insurance companies would not have issued the policy. (U. S. H. & A. I. Co. v. Jolly, 118 S. W., 281.)

8. It is contended by appellant company that the existence of the mortgage on the stock of merchandise was, as a matter of law, material to the risk.

This court has in some cases undertaken to hold as matter of law that certain encumbrances under a certain state of case, were or were not material to the risk. See Phoenix Insurance Company v. Coomes, 13 R., 238, 14 R., 603, 20 S. W., 900; Meschendorf case, *supra*; Lucas case, *supra*, Springfield F. & M. Ins. Co. v. Phillips, 16 R., 390.

But, as the court in Provident Savings Life Assur. Co. v. Whayne, 131 Ky., 84, indicated, the question of materiality is generally one for the jury. In that case is quoted the following language from the opinion of Taft, J., in Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank, 72 Fed., 413, 38 L. R. A., 33:

"A fair test of the materiality of a fact is found in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or rejecting the risk on becoming aware of the fact."

This is substantially the same definition of "materiality" as that given above, quoted from the Jolly case. A brief consideration of the matter will demonstrate that it would be an exceptional case in which the materiality of a fact stated or concealed by an applicant for insurance could be disposed of as matter of law.

In the case at bar, Layne bought the stock of merchandise from Collinsworth at the price of \$2,050, giving him a mortgage thereon and also on a tract of land, to secure the sum of \$1,833. And the materiality of this encumbrance is a matter to go to the jury upon proper evidence of the usage and custom of insurance companies.

9. It is next contended by appellant that appellee was not entitled to a recovery for the loss of the building. The facts appearing in the record concerning this building are these.

In June, 1909, W. H. Justice sold to the Catlettsburg Timber Company certain timber standing upon a tract of land owned by him on Johns Creek in Pike county,

and the timber company proceeded to cut and remove the timber so purchased. In connection with the operation, a commissary store was desirable, and Collinsworth who was president of the company, erected the building and conducted a store therein during the continuance of the logging operations.

In the writing conveying the timber there is no authority given for the erection of this house, and Justice, the owner of the land on which the building stood, testified that he had no recollection of ever having given permission for the erection of this building upon his land; that he had no agreement, verbal or otherwise, as to how long it should be permitted to remain there; that he learned a short time after its erection, however, that it was there. It does not appear that he ever made any objection to Collinsworth concerning the erection of this building on his land.

According to the testimony of Justice, the entry of Collinsworth and erection of this building was the act of a mere trespasser, and continued to be impressed with that quality, unless it be said that by implication of law, the failure of Justice to make objection after he learned of the erection of the building, created a tenancy at will. Justice in his testimony declined to admit that Collinsworth was to have the privilege of removing the building.

So, from the standpoint of the testimony of Justice, Collinsworth was never anything more than a tenant at will, and by virtue of Section 2292, Kentucky Statutes, the attempted transfer by Collinsworth to Layne on February 6, 1912, of the building in question, would, under this state of case operate as a forfeiture to Justice.

On the other hand, Collinsworth testified that he told Justice that the timber company wanted to build a store-building and a barn and some camps, and proposed to Justice that the latter should make no charge for the timber used in erecting these buildings, in consideration of which concession, the timber company would erect good buildings and let them remain on the land after the operations were completed; and that Justice said he did not want the buildings on his land as people would be after him continually, wanting to rent them, and he "would be bothered with having to let people live on his land if these buildings were there;" that Justice required the timber company to pay him for the timber used in the erection of the buildings. On being asked as to whether he talked with Justice about leaving the buildings on the

land after the logging operations were completed, Collinsworth replied that "I don't know that I did."

So that from the standpoint of the testimony of Collinsworth, he had nothing but the right to use the building during the continuance of the logging operations of the Catlettsburg Timber Company, and that period had expired on February 6, 1912, the date on which Collinsworth sold out to Layne. In fact Collinsworth in his testimony seems to concede this, as he says there was no price fixed on the building when he sold out to Layne, and Layne swears that Collinsworth "just throw'd in the buildings."

It is suggested by appellant that the right claimed by Collinsworth, being a contract of lease for a term longer than one year, is within the purview of sub-section 7 of Section 470, Kentucky Statutes (the Statute of Frauds and Perjuries). But, as the timber purchased by the timber company might have all been removed within a year, the statute is not applicable; and in addition, the Statute of Frauds is available only to parties directly sought to be charged. *Crawford v. Woods*, 6 Bush, 200; *Clary v. Marshall*, 5 B. M., 266; *Oldham v. Sale*, 1 B. M., 76; *Bohannon v. Pace*, 6 Dana, 194; *Jacob v. Smith*, 5 J. J. M., 380; *Nelson v. Forgey*, 4 J. J. M., 569; *Bennett v. Tiernay*, 78 Ky., 580; *Harding v. Harding*, 140 Ky., 277; *Walker v. Walker*, 19 R., 628; *Elliott v. Scoville's Assignee*, 144 Ky., 584, 139 S. W., 806.

Collinsworth, in the absence of an agreement to that effect, had no right to remove the building erected by him on the lands of Justice. *Gudgell v. Duvall*, 4 J. J. M., 229; *Gray v. Oyler*, 2 Bush, 256; *Guthrie v. Guthrie*, 78 S. W., 474, 25 R., 1701; *W. S. R. Co. v. Wenner*, 127 A. S. R., 806; and see note to *Cleveland v. Clark*. 81 A. S. R., 181.

And, as the logging operations of the Catlettsburg Timber Company had been completed on February 6, 1912, according to the evidence in this record, he no longer had even the right to occupy it. It is true that an effort appears to have been made to show that there remained on the Justice lands a few trees which were branded at the time of the selection and branding of the trees purchased by the timber company from Justice; but in point of fact, their operations on that land had come to an end. The company never did cut or remove any timber from that land after February, 1912; and during the early spring of 1912 removed its entire plant and equipment to another county.

Appellee, therefore, had no insurable interest in the building; and lacking insurable interest, he cannot recover for the loss of the building.

10. Appellant further contends that the insurance contract is not severable, and being void as to the building, it is also void as to the stock of merchandise.

But, as in the matter of the encumbrance on the merchandise, appellee made no statement in regard to the nature of his claim to the building, when the policy was assigned to him by consent of the insurance company; and the company's agent made no inquiry concerning the matter.

If the insured building had not been the same one in which the insured goods were stored, we think there could be no question that the contract would be severable; but in this present case, the insured merchandise was stored in the insured building, and appellee had no insurable interest in the building.

In such case, we think the true rule is that if appellee's failure to disclose the nature of his claim to the building, was fraudulent, and the fact in respect to the nature of his claim to the building was material to the risk on the merchandise, then the entire policy would be avoided.

We understand this to be the underlying doctrine of *Phoenix Insurance Co. v. Lawrence*, 4 Metc., 9, 81 Am. Dec., 521; at least it seems a sound rule, where no inquiry was made of the insured concerning the fact constituting the basis of avoidance.

11. It is also contended by appellant that proof of loss was not furnished to appellant by appellee within the time required by the terms of the contract.

In this State, the failure to furnish proofs of loss within the time stipulated in the contract is not ground for defeating a recovery on the contract; but the furnishing of proofs of loss is a condition precedent to the maintaining of an action to recover thereon. *Continental Casualty Co. v. Waters*, 97 S. W., 1103, 30 R., 240; *Gragg v. Home Ins. Co.*, 90 S. W., 1045, 28 R., 988.

12. It is further contended by appellant that the proofs of loss that were finally furnished were not a compliance with the stipulations of the contract in respect thereof.

It appears from the record that appellant company acknowledged the receipt of proofs of loss by appellee, and in the letter of acknowledgment, said:



"We desire to call your attention to conditions of the policy which require that sworn statement in proof be filed within sixty days from the date of the fire, which was not done. See lines numbers 69 to 80 inclusive, of the policy conditions, which read as follows. (Here follow the policy stipulations as to what must be shown in the proofs of loss.) For this and other good and sufficient reasons, these papers cannot be accepted as a satisfactory compliance with the policy conditions."

Upon receiving this communication, appellee conceiving it to be a denial of liability upon the ground that the proof of loss was not furnished within sixty days, addressed a letter to appellant saying: "I assume from this that you deny liability and do not intend to take further action toward adjusting this loss."

Under this state of case, we think if appellant company desired to have the benefit of an objection to the sufficiency of the proofs of loss, it was its duty to have stated to appellee that the proofs furnished were not satisfactory, not only because not furnished within the sixty days, but also because they did not contain all the information required by the stipulations of the policy.

The insufficiency of the proofs of loss does not operate to relieve from liability, but only to withhold the right to maintain an action on the policy; and the matter not being one vital to the substantial rights of the insurance company, we think a clear statement of the grounds of its objection to the proofs of loss was necessary in order to render available such objections after action is instituted.

The instructions complained of by appellant were erroneous as they were in substance a peremptory direction to find a verdict for the plaintiff. Appellant offered a number of instructions covering the several points raised by it upon this appeal; but we deem it unnecessary to discuss them further than to say that upon another trial, the court in instructing the jury, should the facts remain the same, will be governed by the principles laid down in this opinion; viz.: (a) the assignment of a policy by consent of the insurer creates a new contract of insurance equivalent to the original issue of a policy direct to the assignee; (b) the fact that an assignee obtains the consent of the company to the assignment of the policy does not amount to a representation that the property was unencumbered; (c) if no inquiry concerning encumbrances has been made and answered and no vol-

untary statement in respect thereto has been made by the insured, Section 639, Kentucky Statutes, is not applicable; (d) where the applicant for insurance does answer inquiries or make voluntary statements, Section 639 controls, and if the fact be material and the answer or statement untrue, the policy is avoided whether the applicant knew the statement to be untrue or not and regardless of any intent to mislead or deceive the insurer (in the absence of estopping knowledge upon the part of the agent); (e) but where no inquiry is made and answered concerning encumbrances, and no voluntary statement in regard thereto is made by the applicant for insurance, an avoidance of the policy will not be declared unless the insured fraudulently failed to disclose the encumbrance, and it was material to the risk; (f) failure to disclose the existence of an encumbrance material to the risk is fraudulent when the insured has knowledge of the encumbrance, and the facts are such that an ordinarily prudent person would have known that the existence of the encumbrance was material to the risk; (g) an encumbrance, or other fact, is material to the risk when with a knowledge of the truth, an insurer acting according to the usual practice or custom among insurance companies would not have issued the policy; (h) materiality is generally a question for the jury; (i) where two items of property are insured by one policy, and the insured has no insurable interest in one of the items, if his failure to disclose his want of insurable interest, no inquiry being made in respect thereof, was fraudulent, and the fact of his want of insurable interest in the one item was material to the risk on the other item, then the entire policy will be void; (j) failure to furnish proofs of loss within the time required by the policy will not defeat liability, but the furnishing of proofs of loss is a condition precedent to the maintaining of an action on the policy; (k) the insufficiency of proofs of loss or their failure to conform strictly to the requirements of the policy as to the information therein to be exhibited, will not defeat liability, but will operate to suspend the right to maintain an action on the policy; (l) where proofs of loss are furnished, if it is the purpose of the insurance company to defend an action on the policy upon the ground of the failure of the proofs of loss as furnished to conform to the requirements of the policy stipulations in respect thereof, a clear statement of such grounds of objections as it contends are competent should be made to the insured.

The judgment appealed from is reversed and remanded to the trial court for proceedings in conformity with the views herein expressed.

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### **Spradlin v. Floyd County Board of Education.**

(Decided February 11, 1915.)

#### **Appeal from Floyd Circuit Court.**

1. **Schools and School Districts—Board of Education—Control and Disposition of School Funds.**—The control and disposition of school funds by the Board of Education when they act within the scope of the statute is entirely in their discretion, and a suit by citizens seeking to have the board expend the money received from the Fiscal Court in certain ways or on certain buildings, will be dismissed.
2. **Schools and School Districts—Board of Education—Rescission of Orders Made by Board.**—If the Board of Education makes an order on its books in advance of its application to the Fiscal Court for school funds indicating to what purpose they will apply the funds, they may at any time afterwards revoke this order.

**HARKINS & HARKINS** for appellant.

**MAY & MAY** for appellee.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

On July 19, 1913, the Floyd County Board of Education met in the office of the Superintendent of County Schools and entered on its records the following order: "Ordered that we prepare our estimate of taxation to file with the fiscal court of twenty cents on each one hundred dollars, and a poll tax of one dollar, for the purpose of building a new house in division number one, district number one."

After this time it appears that the personnel of the Board of Education changed, and in December, 1913, what may be called the new board entered the following order: "The County Board of Education of Floyd County, believing that the public school building of Subdistrict No. 1, Division No. 1, in the town of Prestonsburg, is wholly inadequate to accommodate the number of children in said subdistrict, and being not only too small but in a run-down or worn out condition, so much so that it is impossible to make it answer the needs of said subdistrict

any longer, and we believe that it is absolutely necessary to build a new house in said subdistrict at once; in order to meet the expense of a suitable, modern building in the above named subdistrict, and to meet the incidental expenses and other obligations of the County Board of Education for the coming year 1914, we ask that the Fiscal Court of Floyd County lay a levy for the coming year for school purposes as follows: twenty cents on each one hundred dollars of assessed valuation of property in the county and a capitation tax of one dollar."

Subsequent to the making of this last order of estimate of the Board of Education, the fiscal court entered an order levying a property tax of twenty cents and a poll tax of one dollar for the use and benefit of the Board of Education, to be expended by it in the betterment of the schools of the county.

After this the appellant, Spradlin, a citizen and taxpayer of Educational Division No. 1, District No. 1, suing for himself and other taxpayers of that district, brought this suit in equity against the Board of Education of Floyd County, and after averring that the order made by the Board of Education on July 19, 1913, was conclusive and irrevocable by the board, he averred that in violation of this order the board was attempting to divert the funds arising under the levy of the fiscal court from the purpose specified in this order and was about to expend the money, or a large part of it, raised by the levy in the construction of other school buildings in the county but located outside of Educational Division No. 1, District No. 1.

He further averred that the public school building in Educational Division No. 1, District No. 1, was unsafe, unsanitary and wholly inadequate for the accommodation of the school children in that district, and that it was necessary, in order to furnish a suitable school building in this district, that all the money raised by the levy should be appropriated for that purpose. He, therefore, sought an injunction restraining the board from using the funds arising from the levy for any other purpose than that indicated in the order of July 19th.

To this petition a demurrer was filed and also an answer setting up the reasons that influenced the Board of Education to distribute the money raised by the levy among the schools of the county. The case being submitted on the pleadings, the court ruled that the demurrer to the petition should be sustained and dismissed it.

We do not find ourselves able to agree with counsel for the appellant as to the effect of this order made by the Board of Education on July 19th. We do not think it was binding either on the board as then constituted or on the board as constituted when the application to the fiscal court for funds was made. This order was merely an expression of opinion on the part of the board as to what disposition should be made of the funds raised for school purposes, and this opinion the members of the board had the right to change whenever they saw proper.

Under Section 4426a of the Kentucky Statutes the exclusive management of the public schools of the county is with the Board of Education, and this board has the right to use the funds raised by taxation and turned over to it in such a manner as the best interests of the schools of the county may demand.

In *Fiscal Court of Logan County v. Board of Education*, 138 Ky., 98, in speaking of the powers of the Board of Education in respect to the expenditure of funds, we said: "The expenditure of funds within the statutory limits is entirely within the discretion of the Board of Education. It can use them as provided in the statute.

\* \* \* In short, the objects mentioned in the statute for which the Board of Education may expend the funds under its control comprehend all the educational needs of the county. The statute was intended to, and does, invest the Board of Education with a large discretion in the expenditure of the funds levied for the benefit of the schools, and so long as this discretion is not abused, or is reasonably exercised, the courts will not interfere with it."

Adopting this view of the power of the board, which seems to have been conferred by the statute, we do not think that any citizen can interfere with the discretion of the board in using school funds in the betterment of the schools of the county or control the action of the board in respect to the school building the funds shall be used for the improvement of.

It may be admitted that the school building in Educational Division No. 1, District No. 1, is inadequate for the needs of the school, but doubtless in the judgment of the Board of Education other school buildings in the county were more inadequate. And we think it was plainly contemplated by the statute that the board should be at liberty to use the funds in improving such buildings as in its judgment most needed improving. If the action of the board could be interfered with in the manner

here attempted, there would be continual confusion growing out of the efforts of citizens in different parts of the county to obtain for certain districts such part of the funds as in their judgment was necessary to improve the school buildings.

We think the judgment of the lower court was correct and it is affirmed.

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**Chambers, et al. v. Slone, et al.**

(Decided February 11, 1915.)

**Appeal from Pike Circuit Court.**

**Landlord and Tenant—Breach of Contract by Tenant—Action by Tenant to Recover Money Paid—Counterclaim.**—Where a tenant made a bank deposit of \$270 to secure payment of six months' rent and abandoned the premises at the beginning of his term, and the landlord again took possession in 15 days, in a suit by the tenant to recover the money, and a counter claim by the landlord for damages in the breach of contract and injury to property, the evidence examined and held that the court did substantial justice in allowing \$100.00 to the landlord and remainder of fund to the tenant.

J. S. CLINE for appellants.

J. F. BUTLER, J. J. MOORE and F. W. STOWERS for appellees.

**OPINION OF THE COURT BY JUDGE NUNN—Affirming**

On April 13, 1911, the appellants, Hugh Chambers and Mary Chambers, husband and wife, and J. C. Chambers, their son, about 19 years old, who resided with them, owned a hotel known as the Yukon in the town of Ft. Gay, West Virginia. To be more accurate, J. C. Chambers, the infant, had the legal title to the real estate, and Hugh Chambers and wife owned the furniture and furnishings of the hotel.

Ft. Gay is a town of from 150 to 200 people situated just across the Big Sandy from Louisa. On the date named, the Chambers by written contract rented the premises to the appellee, John Slone, for a term of one year at the rate of \$45 per month. The contract gave Slone an option to retain possession after his year, upon further conditions to be then complied with, and a privilege of buying the property if the infant, J.

C. Chambers, would ratify the contract and make a deed at maturity. Slone's option to purchase, and that part of the contract giving him the privilege, are not material to the issue, except in so far as they show that Slone knew at the time he was dealing with an infant.

The binding part of the contract was for the one year rental period. When the contract was executed, Slone paid \$270 advance rent for the first six months. He also deposited with the First National Bank of Louisa \$270 to the credit of Mary A. Chambers. This deposit was the amount of rent for the last six months, and it was deposited in the bank in conjunction with the contract we have referred to with the understanding that the bank would pay it to Mrs. Chambers at the rate of \$45 per month, after the first six months expired. In the event the property was destroyed by fire during the last six months, rent payments should cease, and the amount then remaining in the hands of the bank should be repaid to Slone.

The rent contract also stipulated that Slone would surrender possession of the premises, furniture, etc., at the expiration of his term in good condition, and that he would conduct the hotel in an orderly way, "and use all efforts to prevent any unbecoming conduct during his occupancy." At or about the expiration of the six months, Slone abandoned the hotel. The Chambers were living in Pike county, this State, and in their absence he had an inventory of the property made and checked over by a person whose repute is not questioned. It is not contended that any of the articles, or at least, none of consequence, are missing. In about ten or fifteen days, the Chambers repossessed themselves of the property through another tenant, and in about a month the Chambers took possession in person.

Slone brought this suit against the Chambers and the bank to recover the \$270 which he had deposited to pay the last six months' rent. He alleged that the Chambers falsely represented to him that the hotel had a large patronage and was doing a paying business; that they concealed from him the fact that the infant had title to the hotel; and that he had been harassed in his possession of the household goods by part of them being levied upon. He asks that the bank be enjoined from paying over to Mary and Hugh Chambers the \$270 for the reason that they are insolvent.

The Chambers by answer denied any fraud or misrepresentation, or any disturbance of his right to hold or possess the hotel and the household goods. By counter-claim they ask a judgment for \$1,000 against Slone for breach of contract and for injury he had done to the good name of the hotel, by making it a resort of drunkards, gamblers, and licentiates. Issue was joined on all of the propositions, and the court heard the proof. It was adjudged that the bank pay the Chambers \$100 on their counter-claim. The balance, \$170, was adjudged to belong to Slone. Chambers and the bank appeal. We have examined the record carefully, and believe the judgment of the court did substantial justice to the parties.

Slone does not satisfactorily show that any fraud was practiced upon him. He was at the hotel for two or three days before he entered into the contract. At that time, all the table room was taken by boarders during all meal hours, and the house was so crowded that the family had to sleep in the parlor. Maybe these were star boarders, but Slone has not offered any evidence to prove it, or to indicate that these conditions were anything out of the ordinary.

The patronage fell off very soon after Slone took possession. The Chambers say that when they resumed the business there was none. They introduce a number of witnesses who testify to the frequent presence about the hotel during Slone's tenancy of various persons of questionable character. There is evidence tending to show that Slone approved the presence of some of them and that his manner of conducting the place damaged its reputation. There was also damage to some of the furniture and bed clothes.

Slone testifies that an officer had an execution for \$30 against Chambers, and levied it on some of the furniture, but it was never sold nor taken out of his possession. Young Chambers never manifested any disposition to repudiate the contract, and at all times Slone had full possession of all the property. It is apparent that Slone gave up the place because he was losing money, and in doing so, he breached his contract. The Chambers repossessed themselves immediately and have been in possession ever since. Recognizing that the lower court could better judge of the credibility of the witnesses, and the amount of damage sustained by the Chambers, we are disposed to accept his judgment, and to say that the award of \$100 to the Chambers amply compensate them.



The bank complains of the judgment and says that on the day Slone deposited the money to the credit of Mrs. Chambers, it loaned that much or more money to the Chambers, and took the Slone paper as collateral. Under the circumstances, the bank acquired no greater right to this fund than Chambers had.

The judgment is therefore affirmed.

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### **Baker, et al. v. Baker, Eccles & Company, et al.**

(Decided February 11, 1915.)

#### **Appeal from McCracken Circuit Court.**

1. **Judgment—On Constructive Service—When Void on Account of Defect in Affidavit for Warning Order.**—It is indispensable that an affidavit for a warning order against a non-resident defendant should aver that the defendant was absent from or believed to be absent from the State. In the absence of this averment the clerk has no authority to make a warning order and the judgment rendered on such constructive service is void.
2. **Judgment—Affidavit for Warning Order—Presumption as to Sufficiency of.**—When the affidavit fails to state that the defendant is absent or believed to be absent from the State, it will not be presumed that he was absent from the averment that he was a non-resident of the State and resided in another State, as he might be, legally speaking, a non-resident and yet actually be in this State when the affidavit was made.
3. **Judgment—Collateral Attack on—Presumption.**—When a collateral attack is made on a judgment, every presumption must be indulged that will support the judgment, for on collateral attack a judgment cannot be successfully assailed unless it is void for a want of jurisdiction in the court to render the judgment that appears upon the record.
4. **Judgment—Direct and Collateral Attack Defined.**—A direct attack on a judgment can only be made in the manner pointed out in the code; that is to say, by prosecuting an appeal or by proceeding in the manner pointed out in Sections 344, 414 and 518 for the modification or vacation of judgments. An attack made on a judgment in any other way is a collateral attack.
5. **Judgment—Presumption on Collateral Attack.**—If the record does not affirmatively show everything that was done, the presumption will be that the things it does not show have been done in such a manner as that there would be no defect; but if the record affirmatively shows everything in such a way as that no presumption can be indulged in, the record must control. Therefore, when the whole record affirmatively shows a defect that deprives the court of jurisdiction, the judgment must be treated as void.

6. **Judgment—Foreign Judgments of Probate Court—Validity and Effect of.**—The judgment of a probate court of a sister State, entered in an *ex parte* proceeding, finding that the decedent was a resident of the county, does not affect the rights of persons in another State interested in the estate who were not parties to the proceedings.
7. **Judgment—Against Party Not Before Court Void.**—No person can be deprived by legal proceedings of property unless he has been given notice, in the manner provided by law, that his right to the property is about to be determined and that he must defend if he desires to save it.
8. **Judgment—Foreign Judgment of Probate Court—Residence.**—The judgment of a probate court, rendered in an *ex parte* proceeding adjudging that the decedent was a resident of the State and county in which the court sat, does not preclude interested persons living in another State from showing, in opposition to the judgment, that the decedent was not a resident of the State or county.
9. **Judgment—Foreign Judgment—Force and Effect of on Descent and Distribution of Property.**—The judgment of a court of general jurisdiction in a sister State in proceedings to settle the estate of an intestate, to which interested persons in this State were parties, by constructive service, does not affect property of the intestate having a situs in this State or determine the rights of the non-residents in such property, although it is conclusive of their rights as to property situated in the State where the judgment was rendered.
10. **Judgment—Estates of Decedents—Situs of Property—Rights of Parties.**—Where an intestate dies leaving property in several States, a court of sufficient jurisdiction in any of these States may, in proceedings to settle his estate, in which non-resident, interested persons are made parties by constructive service, determine conclusively the rights of all the parties as to the property situated in the State, but cannot conclusively determine their rights as to property having a situs in other States. Nor does the fact that the court adjudged that the intestate was a resident of the State change this rule.
11. **Judgment—Foreign Judgments—Force and Effect of.**—Where the judgment of a sister State determined the residence of an intestate and the descent of his estate in a proceeding in which non-resident, interested parties were before the court by constructive service, and a suit is brought on that judgment in this State for the purpose of recovering property here situated, it may be attacked in so far as it attempts to affect property situated in this State, but it is conclusive as to the property situated in the State where it was rendered. Nor is this rule changed by the adjudication that the intestate died a resident of the State where the judgment was rendered.
12. **Judgment—Conflicting Judgments in Suits to Settle an Estate.**—If an intestate dies leaving property in several States and suit is brought in each State to settle his estate on the ground that he

died a resident of that State, interested, non-residents who are before the court only by constructive service may attack the extra-territorial effect of any of the foreign judgments in a suit to enforce them in another State.

13. Domicile—Residence.—A person cannot have a legal residence in two States or countries, although he may have an actual residence in many places and his actual residence may be in one place and his legal residence in another.
14. Domicile—Residence—Intention—Acts and Conduct.—The place of legal residence is fixed both by intention and acts and conduct, and when it is difficult to reconcile the intention with the acts and conduct, the law will, from the facts and circumstances, fix the legal residence.
15. Domicile—Residence—Definition of Legal Residence.—If a person has actually removed to another place with the intention of remaining there for an indefinite time and as a place of fixed domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a "floating intention" to return at some future period.
16. Domicile—Residence—Intention—Acts and Conduct.—When there is a conflict between intention and acts and conduct, the acts and conduct will control.

C. C. GRASSHAM, BERRY & GRASSHAM, PITTS & McCONNICO  
and E. W. ROSS for appellants.

WHEELER & HUGHES for appellees.

#### OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This litigation, concerning the descent and distribution of the personal estate of Charles Baker, and which involves one important and disputed question of fact and several interesting questions of law, arose in this way: Charles Baker was born and lived for a number of years at or near the town of Savannah, in Hardin county, Tennessee. In 1901 he came to Paducah, Kentucky, and engaged in the mercantile business, in which business he remained at Paducah from that time until his death in 1912.

In September, 1912, while en route to his old home in Tennessee for a visit, he died while on board a steamboat in Humphrey county, Tennessee, leaving surviving, as his only heirs-at-law, his widow, the appellant, Mrs. Josie C. Baker, his mother, the appellee, Mrs. Augusta H. Baker, and a brother, E. W. Baker. At the time of his death he owned real property situated in Hardin county, Tennessee, also some personal estate located in that county, as well as valuable personal estate having

a situs in Paducah, Kentucky, consisting of shares of stock in the Paducah Corporation of Baker, Eccles & Company, and a large debt against this corporation.

In November, 1912, his widow applied to the County Court of Hardin county, Tennessee, for letters of administration on the estate of her husband. The proceedings in this court, which were entirely *ex parte*, were had on the motion of the widow. The request was granted and the order of the Hardin County Court appointing her administratrix recites that "at the time of his death the residence of the said Charles Baker was in Hardin county, Tennessee, and that he left therein estate, goods and chattels, rights and credits, the granting of the administration whereof belongs to this court; and Mrs. Josie C. Baker, the widow of the said Charles Baker, deceased, having applied for letters of administration on his estate, and she having a right thereto under the laws of the State of Tennessee, and the court being satisfied of her right to so administer, it is therefore ordered and decreed by the court that said application made by the said Mrs. Josie C. Baker for the granting of letters of administration on said estate to her be granted."

At another term of this county court, held in December, 1912, it appears that Mrs. Baker presented a settlement of her accounts as administratrix, and thereupon this order was made: "It further appearing to the court, from proof introduced to and heard by the court, that the said Charles Baker died intestate, and at the time of his death was a resident of Hardin county, Tennessee, that he left no children or descendants of such surviving, but left surviving his widow, the said Mrs. Josie C. Baker, and, under the laws of the State of Tennessee, the said Mrs. Josie C. Baker, as the widow of the deceased, is entitled to all of the surplus personal property of the estate, and the court being of the opinion that she is entitled to receive and hold as her own individual property all of the surplus personalty of the estate, after payment of the debts of the same and the expenses of the administration, so adjudge and decrees."

It further appears from the settlements and orders of this court that the debts due by the deceased were few in number and trifling in amount, and that the widow as administratrix had in her possession certificates of stock owned by the deceased in the corporation of Baker, Ec-

cles & Co., of Paducah, of the value of \$27,000, and also some other personal assets of small value. On this showing it was ordered and adjudged by the court that Mrs. Baker as administratrix transfer and deliver to herself as the widow of the deceased all of the personal estate in her possession, including these shares of stock, and this was done as appears from the settlements and receipts filed in this court.

It will be observed that the order appointing Mrs. Baker administratrix recites that the court heard proof on the subject of the place of the intestate's residence at the time of his death, but the record does not disclose what character of proof was heard, nor does it appear from the record that his mother or any other persons interested in his estate or its distribution were in any manner parties to this county court proceeding or had any notice of it.

Subsequent to these proceedings in the county court, and on December 28, 1912, Mrs. Josie C. Baker individually and as administratrix of Charles Baker filed in the chancery court of Hardin county, Tennessee, her petition in equity, or bill of complaint, as it is called in the Tennessee practice, against Mrs. Augusta H. Baker, the mother, and E. W. Baker, the brother of the deceased, who were then residents of Paducah, Ky., and also against several persons who were residents of Hardin county, Tennessee. In her petition she set out her appointment as administratrix of the estate of Charles Baker in the Hardin County Court and averred that her husband died intestate, a resident of and domiciled in Hardin county, Tennessee, leaving surviving him as his sole heir and distributee his widow, and as his only other heirs-at-law his brother, E. W. Baker, and his mother, Mrs. Augusta Baker.

The petition further set up her ownership of the stock in the Paducah corporation of Baker, Eccles & Co., the interest of the deceased in several tracts of land in Tennessee, and averred that Mrs. Augusta Baker was asserting some claim and interest in the Tennessee lands owned by Charles Baker, and also to one-half of the personal estate left by him, upon the theory that he died a resident of the State of Kentucky, and, under the laws of that State, his mother was entitled to one-half of his surplus personal estate.

The prayer of her petition was that Mrs. Augusta Baker and E. W. Baker be brought before the court in the manner provided for non-residents and be required to assert whatever claim they might have to the estate left by the deceased. She further prayed that it be adjudged that Charles Baker died a resident of the State of Tennessee, and that she as his widow was the sole distributee and entitled to all of his personal estate after the payment of his debts, and for all other and proper relief.

On the filing of this petition an order of publication was made citing Mrs. Augusta Baker and E. W. Baker, as non-residents, to make defense to the petition on a named day, and it is not questioned that these defendants were regularly proceeded against under the law of Tennessee, as non-resident defendants, although they did not appear in the action.

On April 7, 1913, an order was entered by the court reciting that these non-resident defendants were regularly before the court by publication and having failed to make any defense, the petition, under the Tennessee practice, was taken for confessed as to them. It also appears that in April the depositions of several witnesses were taken for the plaintiff for the purpose of establishing among other things that Charles Baker was a resident of Tennessee at the time of his death.

On May 2, 1913, a judgment was entered in this chancery case adjudging that "the said Charles Baker at the time of his death was a citizen of and had his domicile at Savannah, Tennessee; that at no time was he a citizen of and domiciled at Paducah, Kentucky; that all of his life he was a citizen of and had his domicile at Savannah, Tennessee, and the court so adjudges and decrees."

It was further adjudged that his widow was the sole distributee, and as such entitled, in accordance with the laws of Tennessee, to the whole of the surplus personal property of which he died the owner. She was further adjudged entitled to the 270 shares of stock in the Baker, Eccles & Co. corporation and the accumulated profits thereon.

This is all that need be said at this time respecting the proceedings in the Tennessee courts and the orders and judgments therein made.

Turning now to the Kentucky proceedings, it appears that on November 27, 1912, Mrs. Augusta Baker, mother

of Charles Baker, was granted letters of administration on his estate by the County Court of McCracken county, Kentucky, and, on December 3, 1912, as such administratrix she filed a petition in the McCracken Circuit Court for a settlement of the estate of Charles Baker, and to this petition his widow and Baker, Eccles & Co. were made defendants. In this petition it was averred that Charles Baker died a resident of McCracken county, Kentucky, the owner of shares of stock in the Baker, Eccles & Co. corporation of the value of \$27,000, together with accumulated profits thereon, and some other articles of personal property, and also a claim of several thousand dollars against Baker, Eccles & Co. She also set up that herself and the widow were the only heirs-at-law of the decedent entitled to an interest in his estate, and that she was entitled to one-half of his personal estate after the payment of debts and the widow to the other one-half.

In this action Mrs. Josephine Baker was proceeded against as a non-resident defendant, but whether she was brought before the court by virtue of these proceedings is a question that will later be disposed of. For the present it is sufficient to say that Mrs. Josephine Baker did not appear in this action, and on February 13, 1912, a judgment was rendered by the McCracken Circuit Court adjudging that Charles Baker died a resident of McCracken county, Kentucky, and that his mother, Mrs. Augusta Baker, under the Kentucky law, was entitled to one-half of the surplus personal estate of the deceased, and Mrs. Josephine Baker, as his widow, to one-half thereof.

In the judgment Baker, Eccles & Co. was directed to cancel the 270 shares of stock in the corporation issued to Charles Baker and to re-issue one-half of these shares to Mrs. Josephine Baker and to re-issue the other half to Mrs. Augusta Baker. The remaining personal property found to be owned by the deceased after the payment of debts was also directed to be divided equally between these two persons.

In June, 1913, Mrs. Josephine Baker, individually and as administratrix of Charles Baker, filed a suit in the McCracken Circuit Court against Baker, Eccles & Co., in which, after setting up the orders and judgments made in the Tennessee courts and her sole ownership of the personal estate of the deceased by virtue thereof, she

prayed that Baker, Eccles & Co. be required to transfer to her individually the 270 shares of stock to which she was adjudged entitled by the Tennessee chancery judgment, and also for judgment against it for \$11,429.17, in which amount she alleged it was indebted to her husband at the time of his death. With this petition she filed certified copies of all the proceedings had in the Tennessee courts, together with a copy of the evidence heard in the chancery court of Tennessee.

To this petition Baker, Eccles & Co. filed its answer putting in issue all the averments of the petition, and also relied on the judgment of the McCracken Circuit Court in the case of Mrs. Augusta Baker heretofore mentioned.

Mrs. Augusta Baker came into this suit by an intervening petition in which she averred that Charles Baker died a resident of the State of Kentucky, and that under the laws of this State, and by virtue of the judgment of the McCracken Circuit Court in the suit brought by her, she was entitled to the interest in the estate of Charles Baker decreed to her by the McCracken Circuit Court judgment, which she averred was binding and conclusive upon Mrs. Josephine Baker. She further put in issue the validity of the orders and judgments made in the Tennessee county court, as well as in the chancery court of Tennessee, and averred that the judgments in each of these courts in so far as they determined that Charles Baker died a resident of the State of Tennessee, and that his widow was entitled to the whole of his personal estate after the payment of his debts were void, because neither of these Tennessee courts had jurisdiction to make orders or judgments so declaring, and she relied on the judgment of the McCracken Circuit Court in the suit brought by her as finally determining not only the domicile of Charles Baker at the time of his death, but the devolution of his estate.

After motions to strike out parts of the petition of Mrs. Augusta Baker, as well as demurrers thereto had been overruled, a reply was filed controverting the affirmative averments of the pleading of Mrs. Augusta Baker, and it was further averred that the judgment rendered in the McCracken Circuit Court in so far as it attempted to determine the rights of Mrs. Josephine Baker was void, because she was not before the court by either actual or constructive service of process.



When the pleadings had been made up, a large amount of evidence was taken on the issue as to the residence of Charles Baker at the time of his death, and thereafter, the case having been submitted for hearing, it was adjudged that the petition of Mrs. Josephine Baker be dismissed, and from that judgment this appeal has been prosecuted.

From this necessarily extended statement of the proceedings in the Tennessee and Kentucky courts it will be seen that the real question at issue in this case is whether the widow of Charles Baker is entitled to the whole of his surplus personal estate under the Tennessee law or his mother, Mrs. Augusta Baker, to one-half of it, under the Kentucky law, and that the solution of this question depends upon the place of residence of Charles Baker at the time of his death and the force and effect to be given to the Tennessee and Kentucky judgments.

In behalf of Mrs. Josephine Baker the argument is made that the Tennessee judgments finding that Charles Baker died a resident of Tennessee are conclusive of this question whether in fact he died a resident of that State or not, and this being so, his widow, under the law of Tennessee, about which there is no dispute, was and is entitled to the whole of his surplus personal estate. It is further contended in this behalf that the Kentucky judgment rendered by the McCracken Circuit Court in the case of Mrs. Augusta Baker, in so far as it undertook to determine Mrs. Josephine Baker's interest in the estate of her husband, was void, because she was not before the court either by actual or constructive service.

For Mrs. Augusta Baker the argument is made that Charles Baker died a resident of the State of Kentucky, and therefore the Tennessee courts had no jurisdiction to determine that he died a resident of Tennessee or to distribute his estate under the laws of Tennessee, and, further, that the Kentucky judgment determining the rights of the widow and the mother is and was a valid judgment, and, as it has not been modified or vacated or any appeal prosecuted therefrom, it finally determined the rights of the parties.

Other questions upon which these respective arguments rest will be noticed in the course of the opinion.

Taking up first the validity and effect of the judgment of the McCracken Circuit Court, which, as stated, determined that Baker died a resident of Paducah, Kentucky,

and that his mother, under the laws of this State, was entitled to one-half of his surplus personal estate and his widow the other one-half, the conclusion we have reached with respect to this judgment renders it unnecessary to discuss its effect or do more than set forth the reasons that have brought us to the conclusion that it is void in so far as it affects the rights of the widow.

In the suit in which this judgment was obtained the widow was proceeded against as a non-resident defendant. She was not actually served with process, nor did she in any manner enter her appearance to this action; so that unless the warning order proceedings were sufficient to bring her before the court on constructive service, she cannot be treated as being in any manner affected by this judgment; in other words, her status is the same as if she had not been made a party to this suit.

Without setting out in full Sections 57-61 of the Code covering the subject of constructive service, we think it sufficient for the purposes of the question we have to say that Section 57 of the Code provides that a warning order may be made upon an affidavit showing that the defendant is a non-resident of this State and believed to be absent therefrom, and also stating in what country the defendant resides or may be found and the name or place where a postoffice is kept nearest to the place where the defendant resides or may be found.

Other sections of the Code provide that when this affidavit is made the clerk of the court shall make an order warning the defendant to defend the action on the first day of the next term of the court which does not commence within sixty days after the making of the order. In other sections it is provided that the clerk at the time of making the warning order shall appoint an attorney whose duty it shall be to inform the defendant of the pendency and nature of the action and report to the court the result of his efforts.

In this suit no separate warning order affidavit was made, nor was it necessary that one should have been made if the petition itself, which was properly verified, contained the matter which should have been embraced in an affidavit. The verified petition upon this point averred that "Mrs. Josephine Baker has left the State of Kentucky and is now a non-resident thereof, and she resides at Savannah, in the State of Tennessee, at which place a postoffice is kept and which is the nearest post-office to the residence of said Mrs. Josephine Baker."

When the petition containing this affidavit was filed, a warning order, in due form, was made and a warning order attorney was appointed as provided in the Code, who, before the judgment was rendered, filed in proper form and manner a report showing that he had written Mrs. Baker at the address named, informing her of the pendency and nature of the action against her, but had not received any reply. So that the defect, if any, in these warning order steps consists in the insufficiency of the affidavit upon which the warning order was made. This affidavit is the basis of warning order proceedings, and no warning order can be made by the clerk or attorney appointed under it until the affidavit provided by the Code has been made.

It will be observed that the affidavit conforms strictly to the Code requirements except that it fails to aver that Mrs. Josephine Baker is believed to be absent from the State. It sets out that Mrs. Baker has left the State and is a non-resident thereof, and gives the place of her residence in the State of Tennessee and her postoffice in that State, but there are no words in the affidavit that supply the place of the averment that she was believed to be absent from this State at the time the affidavit was made. And we think this averment was indispensable to the sufficiency of the affidavit and that in its absence the clerk had no authority to make the warning order or to appoint the attorney. In cases like this it is alone the fact that the defendant is absent or believed to be absent from the State at the time the affidavit is made that authorizes the proceedings against him as a non-resident. If the defendant is not absent or believed to be absent from the State, he cannot be proceeded against as a non-resident and accordingly the court would have no jurisdiction on constructive service to enter a judgment affecting his rights. This is so because it is the making of the warning order that commences the action, and the clerk has no authority to make this order except on a sufficient affidavit.

Admitting this to be true, it is said that we should presume that the defendant was absent or believed to be absent from the State when the affidavit was made from the averment that the defendant was a non-resident of the State and resided in another State. But we do not think so. A defendant might be, legally speaking, a non-resident and yet be actually in the State and in the

county where the suit was brought when the affidavit and warning order were made. *Redwine v. Underwood*, 101 Ky., 190; *Warrick v. McCormick*, 150 Ky., 800.

The argument is also made that, as this is a collateral attack on the validity of the judgment of the McCracken Circuit Court, every presumption must be indulged that the proceedings in that court were regular and every step necessary to give it jurisdiction to render the judgment was properly taken.

It is true that every presumption must be indulged to support a judgment against collateral attack, for in this respect there is a well defined and distinct difference between a direct and a collateral attack on a judgment. It is also well settled that on collateral attack a judgment cannot be successfully assailed unless it is void for a want of jurisdiction in the court to render the judgment that appears upon the record. *Bamberger v. Green*, 146 Ky., 258; *Maysville R. R. Co. v. Ball*, 108 Ky., 241; *Dennis v. Alves*, 132 Ky., 345.

We are also clear that the attack made on this Kentucky judgment was a collateral attack, as a direct attack on a judgment can only be made in the manner pointed out in the Code; that is to say, by prosecuting an appeal or by proceedings had under the Code and in the manner pointed out in Sections 344, 414 and 518 for the modification or vacation of judgments. An attack made on a judgment in any other way is a collateral attack. *Black on Judgments*, Volume 1, Section 252; *Vanfleet on Collateral Attack on Judicial Proceedings*, Sec. 2; *Duff v. Hagins*, 146 Ky., 792.

Being then a collateral attack, will we presume that all the proceedings taken by the court necessary to sustain the validity of the judgment were regular? The rule upon this subject is that if the record is ancient or it does not affirmatively show everything that was done, the presumption will be that the things it does not show have been done in such manner as that if they appeared in the record there would be no defect and so the judgment on collateral attack will be treated as erroneous, but not void, and consequently not subject to collateral attack. But if the record is fresh and affirmatively shows everything in such a way as that no presumption can be indulged in that something was done that does not show in the record, then the record must control, for there is no room to presume that something

else may have been done that would cure the defect, and in this state of case if the defect is substantial the judgment is void and may be attacked collaterally. Supporting this rule reference may be had to *Hynes v. Oldham*, 3 T. B. Mon., 266; *Benningfield v. Reed*, 8 B. Mon., 102; *Newcomb v. Newcomb*, 13 Bush, 544; *Carr v. Carr*, 92 Ky., 552; *Wilson v. Teague*, 95 Ky., 47; *Sears v. Sears*, 95 Ky., 173; *Segal v. Reishert*, 128 Ky., 117; *Steel v. Stearns Coal & Lumber Co.*, 148 Ky., 429; *Kreiger v. Sonne*, 151 Ky., 739.

The rule, however, favoring all presumptions that can be indulged in to sustain the validity of a judgment on collateral attack cannot be here invoked because the whole of a new record is here, and it affirmatively shows the absence of the conditions upon which the court had jurisdiction to render a judgment affecting the rights of a non-resident, and this being so this judgment as to the widow must be treated as void. *Green's Heirs v. Breckinridge's Heirs*, 4 T. B. Mon., 541; *Brownfield v. Dyer*, 7 Bush, 505; *Arthurs v. Harlan*, 78 Ky., 138; *Grigsby v. Barr*, 14 Bush, 330; *Clark v. Raison*, 126 Ky., 486.

But the invalidity of this judgment does not, as we will presently attempt to show, have the effect claimed by counsel for the appellant, or strengthen the case for the widow.

Taking up next the validity and effect of the Tennessee county court judgment, we are clearly of the opinion that so much of this judgment as undertook to adjudicate that the residence of Charles Baker was in Hardin county, Tennessee, at the time of his death, and as a legal consequence of this his widow, under the laws of Tennessee, was his sole distributee and entitled to the whole of the surplus of his personal estate, was void so far as the rights of his mother were attempted to be affected. In view of the admitted fact that Charles Baker, at the time of his death, owned both real and personal estate in Hardin county, Tennessee, there can be no doubt that under the laws of Tennessee the county court of Hardin county had power and jurisdiction to grant letters of administration on his estate to his widow. This jurisdiction and power attached by virtue of the fact that he owned real and personal property in that county and was not dependent on the condition that he died a resident of that county. If he was, in fact, at

the time of his death, a resident of McCracken county, Kentucky, the Tennessee county court would, under the circumstances, have had the same power and jurisdiction to grant letters of administration on his estate as if he had admittedly died a resident of Hardin county, Tennessee.

But it is one thing to grant letters of administration and another very different thing to determine the place of the intestate's residence for the purpose of affecting the devolution of his estate. The granting of letters of administration alone would not in any manner affect the devolution of his estate or determine the distributees or the shares to which they were entitled. The administrator would merely hold the estate in trust for the benefit of the persons entitled to the estate, with the duty of turning the estate over to such persons when their right was established and in the time and manner provided by the Tennessee law. So that the mother of Charles Baker could not and does not complain of so much of the Tennessee county court judgment as granted letters of administration upon his estate.

But manifestly this Tennessee county court could not, in this *ex parte* proceeding or application, instituted by the widow, to which his mother was not a party, on any kind of service or publication, have jurisdiction or power to adjudicate that the deceased was a resident of the State of Tennessee and thereby conclusively determine that his widow was entitled to the whole of his surplus personal estate and exclude his mother from participation. We do not know of any authority that would permit an interested party to be deprived of his right to make defense, or that would conclude him by a judgment rendered in the manner of this Tennessee judgment. Here we have two contestants for the personal estate of Charles Baker, each of them having at least some ground upon which to assert her right to an interest in his estate, and yet an inferior court, in the absence of one of the parties, undertakes to and does adjudicate a fact upon which the other party becomes, by virtue of a local statute, entitled to the whole of this estate. It seems to us that a mere statement of this proposition is sufficient to conclusively refute the effect claimed for this county court judgment. It is fundamental law, recognized, as we think, by every court, that no person can be deprived in a legal proceeding

of property to which he has or asserts claim unless he has been given notice in the manner provided by law, which may, generally speaking, be said to be actual or constructive notice of the pendency of the suit and that his right to the property is about to be determined and he must defend if he desires to save it.

. Out of numerous authorities supporting these general statements we think it sufficient to refer to the leading case of *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565. Another case involving a question very much like this was before the court in the case of *Overby v. Gordon*, 177 U. S., 214, 44 L. Ed., 741. In the *Overby* case, which involved a contest over the distribution of the estate of one Haralson, it appears from a statement of the facts that a Mrs. Gordon instituted proceedings in an appropriate court of the District of Columbia for the purpose of probating the last will of Haralson and to obtain letters of administration. In this proceeding an issue was made as to the place of residence of the deceased at the time of his death, and there was introduced a record showing that administration on his estate had been granted by a probate court of the State of Georgia. The District of Columbia court ruled that he died a resident of the District of Columbia and denied the conclusive effect of the Georgia proceedings. In considering the case the Supreme Court said:

“The single question for consideration is, was the grant of letters of administration by the court of ordinary of De Kalb county, Georgia, competent evidence upon the issues tried in the Supreme Court of the District of Columbia respecting the domicile of the decedent at the time of his death?”

The order of the Georgia court granting letters of administration recited “that Haralson died a resident of De Kalb county, Georgia,” and it was contended that this was a conclusive adjudication of the place of his residence, notwithstanding the fact that the proceedings were *ex parte* and that no notice to other interested parties was given sufficient to bring them before the court for the purpose of determining their rights. And the court said: “From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary

step in the management and control by the court of assets of the estate. The question of domicile would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject matter or *res* upon which the power of the court was to be exercised, was, therefore, the estate of the decedent."

Then, after an extended discussion of the question, the court said: "We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile by a mere finding of such fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.

"Our conclusion being that the adjudication of the fact of domicile in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicile of the deceased." To the same effect is *Thormann v. Frame*, 176 U. S., 350, 44 L. Ed., 500.

If in a proceeding like the one had in this county court the rights of persons not in any manner parties to the proceeding could be conclusively determined and property to which they asserted claim be taken from them in the manner here attempted, it would follow that in all cases judgments might go affecting the rights of persons who were not parties to the proceedings, and this practice would of course be at war with the established doctrine that no person can be deprived of his property without opportunity to be heard in his defense. *Black on Judgments*, Vol 1, Sec. 226; *Hovey v. Elliott*, 169 U. S., 42 Law Ed., 215.



Our conclusion, therefore, is, upon this branch of the case, that the adjudication of the Tennessee county court that Baker died a resident of Tennessee, and accordingly his widow was entitled to the whole of his surplus personal estate, was absolutely void and open to attack in any court in which a claim under it might be asserted. *Spencer v. Parsons*, 89 Ky., 577; *Francis v. Lilly*, 124 Ky., 230; *Carpenter v. Moorelock*, 151 Ky., 506; *Black on Judgments*, Vol. 2, Section 894.

Passing now to the chancery court judgment, we find that under the laws of Tennessee the chancery court occupies substantially the same position that circuit courts do in this State. In other words, Tennessee chancery courts are courts of general jurisdiction, and accordingly have the power to settle estates of deceased persons and determine the rights of conflicting claimants thereto, as well as all other matters that may be necessary in adjudicating the rights of the parties. So that the chancery court had jurisdiction to adjudge that Baker died a resident of Hardin county, Tennessee, and that his widow, under the law of Tennessee, was entitled to the whole of his surplus personal estate. Admitting all this, and, further, that his mother was properly before the court on constructive service, the only remaining question is the effect to be given to this judgment of the chancery court when it is attempted to take under it personal property having a situs in this State. We use the expression "having a situs in this State" because we think Baker died a resident of Kentucky, and accordingly the personal estate owned by him at his death and here in controversy had a situs in this State.

On this issue counsel for the widow urgently insist that this Tennessee chancery judgment, standing as it does unmodified and unreversed, conclusively settled not only in Tennessee but everywhere every question determined by it affecting parties who were before the court by actual or constructive service, and therefore its operation and effect could not be called in question when suit was brought on it in this State.

That it had in the State of Tennessee, where it was rendered, and as to property situated in that State, the conclusive effect claimed for it, may be readily admitted, but whether it shall have that effect as to property having a situs here is another question. It is a general rule of law that judgments of courts having ju-

risdiction of the person and subject matter of the action are conclusive until modified or vacated in the manner provided by the law of the State in which they are rendered upon the rights of all the parties who were before the court by such manner of process as would give the court jurisdiction of their person. But this rule is not without exceptions, and one of these exceptions arises, as we think, when a court undertakes to determine the descent and distribution of the estate of a person situated in another State so as to affect the rights of interested parties who have not been brought before the court by actual service of process and who have not entered their appearance. If Mrs. Augusta Baker, the mother, had entered her appearance in this Tennessee action or had been brought before the court by actual service of process, she would be conclusively bound by the judgment in its effect upon property everywhere until she procured its modification or vacation in some manner allowed by the law of Tennessee. But, as she was only before the court by constructive service, we do not think the Tennessee judgment conclusively determined her right to the personal estate of Charles Baker that was situated in this State, although it did so determine it as to the property that had a situs in Tennessee, and this determination remains conclusive until it is overthrown by appropriate proceedings in the courts of Tennessee.

When suit was brought on that judgment in this State for the purpose of taking hold of the personal estate situated in this State, we think Mrs. Augusta Baker had the right to question the extra-territorial effect claimed for it. Or, in other words, to contend in opposition to the judgment that she was entitled to her share under the laws of this State of the personal estate of her son having a situs in this State at the time of his death; leaving, however, in full force and effect the judgment so far as it operated upon the estate of Baker situated in the State of Tennessee at the time of his death, and giving to it in that State the full faith and credit to which it was entitled under the laws of Tennessee.

An interesting and sound discussion of the effect of the judgment of a sister State rendered on constructive service when attempted to be made operative upon property located in another State, may be found in *Williams v. Preston*, 3 J. J. Mar., 600. In that case the court

said: "It appears from the record that the appellant was 'no inhabitant' of Virginia, when the suit in chancery was instituted. \* \* \* Taking it therefore as conceded that he was not only a resident but a citizen of Kentucky, we are of the opinion that the decree against him can have no other effect than to operate on his property which was within the jurisdictional limits of Virginia, and to attach which the suit in chancery was instituted.

"No court in Virginia could rightfully render a decree '*in personam*' against a citizen of Kentucky, unless by being in Virginia and served with process, or by entering his appearance, he gave the court personal jurisdiction. Either the person or some of his property must be within the jurisdiction of a court before it can render any decree against the person or thing. The property does not give jurisdiction over the person. If a citizen of Kentucky own property in Virginia that property is subject to the laws of Virginia and her courts may have jurisdiction over it. But he, whilst he shall remain in Kentucky, is not subject to the laws of Virginia, nor can her courts exercise any jurisdiction over him, except so far as to reach his property in Virginia. \* \* \*

"So the court of chancery of Virginia had jurisdiction over the chose in action of the appellant, which was attached; but its power extended no farther. It could sequester the property and subject it to the payment of the appellee's debt, but it had no power to render a decree against the appellant affecting him otherwise than by acting on his property in Virginia." To the same effect are *Harris v. John*, 6 J. J. Mar., 257; *Brand v. Brand*, 116 Ky., 785; *Downs v. Downs*, 123 Ky., 405; *Ely v. Hartford Life Ins. Co.*, 128 Ky., 799; *Freeman on Judgments*, Sections 564, 584; *Black on Judgments*, Sections 794, 795, 904 and 905.

In view of these authorities, and many others that might be cited, we think it safe to state it as a rule of general application that a court of one State has no jurisdiction to enter a judgment on constructive service affecting real or personal property situated in another State, its jurisdiction being confined to affecting by its judgment property situated in the State where the judgment was rendered.

This being so, it seems to us that there is no sound reason, so far as the rights of the parties to this suit are concerned, why this rule should not be applied in this case. The attempt is here made to affect property situated in this State by the Tennessee judgment to the same extent as if it was sought to affect it by a judgment in an attachment suit or a suit to enforce a mortgage or other lien obtained in the Tennessee court on constructive service.

But it is said by counsel that as the chancery court had unquestioned jurisdiction to determine that Baker was a resident of Tennessee, and as that was within the proper scope of the suit brought, the adjudication that he was a resident is conclusive upon this subject, and therefore it follows as an inevitable result of this that the widow is entitled to all of his surplus personal estate no matter where situated, if it were such character of personal estate as had a situs at the residence of the owner. It may be admitted that the question of Baker's residence was a proper subject for adjudication in that suit, but this adjudication should not be given extra-territorial effect when to do so would be to determine the status of property having a situs in this State.

It would be the merest evasion of the principle we have announced to say that a court on constructive process could not directly settle the descent and distribution of property in another State, but might conclusively but indirectly settle it by adjudging another point upon which the devolution of the foreign estate would depend, and this is precisely the effect here claimed for this Tennessee judgment. If this were a sound rule, then, for example, a judgment on constructive service might be rendered against a citizen of one State by a court of another State to the effect that he had signed and delivered the note sued on and it was a just and existing debt against him without going any further, and if suit were brought in the State of his residence upon this judgment, the defendant would be denied the right to make any defense that would defeat the debt, and judgment would inevitably go against him for the amount of it. It would further follow as a result of the recognition of the doctrine asserted by counsel that if a person died intestate in one State owning property in several States, the judgment first rendered in a court of any of these States that determined that he was a resident of

that State, with all the parties in interest before the court by constructive service, would affect in a conclusive and unimpeachable way the descent of his property in every State in which it was situated, although, in truth and in fact, the intestate may not have been a resident of the State.

In other words, under this rule, if a man died intestate, leaving estate situated in several States, and a suit setting up his residence therein was brought in each of these States by some of his heirs for the purpose of determining the descent and distribution of his estate, and the heirs residing in each of the other States were brought before the court by constructive service, then the judgment that was first rendered, if it recited that the deceased died a resident of that State, would be conclusive on the rights of all the heirs and settle the title to the estate situated in each of the States. The further effect of this doctrine would be that the rights of heirs in cases like this would be determined, not on the justice or merits of their respective claims, but on their diligence or ability to obtain the first judgment. It would be a race as to which could obtain the first judicial recognition of his asserted rights, with the prize depending on the speed with which the judicial machinery in each of the several States could be put in motion and adjudicate the question presented.

It appears to us that this method of settling the property rights of conflicting claimants by judicial action ought not for a moment to be entertained. It would give to the swift an advantage they ought not to have and take from the slow rights of which they ought not to be deprived.

How, then, it may be asked, and indeed is, are the rights of heirs to be determined when there is property of the decedent situated in several States? Our answer is, that the courts of each State in which the estate has a situs at the time of the death of the deceased have jurisdiction, in a suit brought for that purpose, and in which all of the interested parties are brought before the court by constructive service of process, to determine between them their respective rights to the property situated within the State. And if one or more valid domestic judgments are thus rendered, the force of these judgments is to be confined within the jurisdiction of the court rendering the judgment, the order in which the

judgments were rendered not being controlling, the last judgment being equally as effective as the first and the first of no more force than the last.

With this status existing between heirs having antagonistic interests, each relying upon the judgment most favorable to him, the question comes, how could the heirs who were not satisfied with the property received under the judgment they had obtained impeach or overthrow the judgment in the other State? Our answer to this is, that the parties to any of these judgments may take the judgment they depend on and go into any of the other States in which judgments were rendered, or in other States in which estate is situated, and bring a suit in a court of competent jurisdiction in that State for the purpose of having the rights of the parties to the property in that State settled, and in that court the rights of all the parties in interest who are brought before the court by actual service of process, or who entered their appearance would be conclusively settled as to the property in that State by the judgment rendered in the suit so brought, subject, of course, to the right to have it modified or reversed according to the practice of the State. This case furnishes a good illustration of our meaning. Mrs. Josie Baker brought in the McCracken Circuit Court a suit on the Tennessee judgment, and Mrs. Augusta Baker entered her appearance to that suit. So that the court had complete jurisdiction of both the persons and subject matter and the right to render a judgment that would be conclusive as between the parties as to the property situated in this State, leaving the Tennessee judgment in full effect as to the property situated in that State.

The remaining question, and the one that, according to our view of the law, is decisive of the rights of the parties to the property in this State is, was the domicile or legal residence of Charles Baker in Tennessee or Kentucky at the time of his death? This question we are fully authorized to conclusively dispose of, because all the parties are actually before the court and each of them has had opportunity to make defense to the claim asserted by the other. If Charles Baker died a resident of Kentucky, then his personal estate, practically all of which has a situs at the place of his residence, passed under the law of descent and distribution in this State. On the other hand, if he died a resident of the State of Tennessee, then it must pass under the laws of that State.

We think he died a resident of this State, and will proceed to state the reasons that have induced us to come to this conclusion.

That he was born in Tennessee and lived there until 1901, when he moved to Paducah, Kentucky, where he lived until he died, is admitted. Tennessee being then his domicile of origin, using the word domicile interchangeably with legal residence, the disputed issue is, did he change his residence and take up a residence of choice in Paducah? If he did the presumption is that his domicile of choice continued until his death.

On the one hand, it is contended that he came to Paducah with the intention of making that his residence and continued a resident of that place until his death, or, that whatever his intention was, his acts and conduct after he came to Paducah constituted him in law a resident of that place.

On the other hand, it is contended that he came to Paducah merely for the purpose of engaging in business without any intention of making it his home, and never established by his acts or conduct a legal residence in Paducah.

The legal principles determining the place of residence when it is in dispute are fairly well established. The difficulty arises only when it is attempted to apply these principles to the facts of each particular case. Generally speaking, a person cannot have a legal residence in two States or countries, although he may have an actual residence in many places. His actual residence may be in one place and his legal residence may be in another. It does not always follow that the place of actual residence is the place of legal residence, as a person may have an actual residence at a place where he is only temporarily located and where he has no intention of remaining permanently or indefinitely, while his legal residence will be at that place where he intends to remain permanently or indefinitely. Often, too, the place of legal residence is fixed both by intention and acts, and where both of these conditions concur, there is little trouble in determining the residence; but in other cases it is difficult to reconcile the intention with the acts, and when a condition like this arises, the law will, from facts and circumstances, fix the legal residence of the party.

Out of a great number of cases on this subject we think the following may be selected as stating in a general way the rules of law that control. In *Gilbert v. David*, 235 U. S., 561, 59 L. Ed., —, the Supreme Court, quoting with approval authorities, said: "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period."

In *Ringgold v. Barley*, 5 Md., 186, 59 Am. Dec., 107, the court said: "Whence once removed to his new domicile, however, the party's purpose to remain need not be fixed and unalterable. If it becomes a place of fixed present domicile, it will be sufficient to fix a residence, and although there may be a floating intention to return to his former place of abode at some future period, still these circumstances will not defeat the newly acquired residence or the rights and obligations which attach to it."

In *Gilman v. Gilman*, 52 Me., 165, 83 Am. Dec., 502, the court said: "But if a citizen of Maine, with his family, or having no family, should go to California to engage in business there, with the intention of returning at some future time, definite or indefinite, and should establish himself there, in trade or agriculture, it is difficult to see upon what principle his domicile could be said still to be here. His residence there, with the intention of remaining there a term of years, might so connect him with all the interests and institutions, social and public, of the community around him, as to render it not only proper but important for him to assume the responsibilities of citizenship, with all its privileges and its burdens. Such residences are not strictly within the terms of any definition that has been given; and yet it can hardly be doubted that they would be held to establish the domicile."

In *Helm's Trustee v. Com.*, 135 Ky., 392, this court, quoting with approval *Cooley on Taxation*, said: "No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must be determined in each particular case. \* \* \* From this point of view it is manifest that very slight circumstances must often decide the question. It depends upon the pre-



ponderance of evidence in favor of two or more places; and it may often occur that the evidence of fact tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of still more conclusive and decisive character, which fix it beyond question in another."

In *Boyd's Exor. v. Com.*, 149 Ky., 764, the court quoted with approval this language: "It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicile of choice. But there must be to constitute it actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or conditions in which a person may be as to the domicile of his origin, or from the seat of his fortune, his family and pursuits of life. A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling, it does change the domicile." *City of Lebanon v. Biggers*, 117 Ky., 430; *Graves v. City of Georgetown*, 154 Ky., 207, and *City of Winchester v. VanMeter*, 158 Ky., 31, are also illustrative cases upon this subject.

When we come now to attempt to apply the principle of these cases we are confronted with a mass of evidence on the subject of Baker's intention that is apparently in conflict with his acts and conduct, but out of all of it we think sufficient facts and circumstances can be gleaned to establish with certainty Paducah as the place of his legal residence when he died.

That he was warmly attached to Savannah, Tennessee, the place of his birth, and his home for many years, is shown by many statements made by him to different persons and at different times and places; and there is also much evidence of his expressed intention to return at some time to Savannah and make that place his permanent home. For example, he would often say that his home was at Savannah. That neither he nor his wife would be happy until they got back there. That he was going to build a house at a certain place in Savannah, and that he was in Paducah only for the pur-

pose of making money, and after he had accumulated a sufficiency he was going back to his old home in Tennessee.

When approached by candidates at Paducah and asked to vote for them, he would often say he could not do it because he voted in Tennessee. He would also say that he never owned a home in Paducah and did not own any real estate there, and did not want to buy any, as when he bought a home he was going back to Tennessee. Other witnesses say that he took an interest in Tennessee politics and at times observed that he did not want to give up his citizenship in that State. He told others that he had never voted in Paducah; that it was a good place in which to make money, but not to live; and on one occasion when speaking to a lawyer about writing his will he told him that his home was in Tennessee and that he never claimed Paducah as his home. To other persons he said that he never paid any taxes in Kentucky, as he was a citizen of Tennessee and voted there and paid his poll tax there and expected to die there. There is also evidence that at the time of his death he was going to Savannah for the purpose of making some arrangements about building a house there. And it appears that he was assessed and paid a poll or head tax in Hardin county, Tennessee, in 1901 and 1902 and also in 1906.

That he had an affectionate regard for the State of his birth may well be conceded, but many of his expressions of attachment for the State and its people are attributable to the circumstance that the firm of Baker, Eccles & Company drew a large part of its business from the State of Tennessee, and its members were especially anxious to retain the friendship and good will of Tennessee people. With this business object in view it appears that they never neglected an opportunity to indulge in agreeable speeches about that State. As illustrating this, E. W. Baker, a brother, who moved from Savannah to Paducah at the time the firm was organized, said: "As a matter of policy for the benefit of the business we referred continually to Savannah as home and our attachment for the place and done everything of the kind that we could think of that would foster a sentiment on the Tennessee River in favor of our business."

It is also manifest from the evidence that Charles Baker was a very genial man, with a disposition to be on friendly terms with every person with whom he came in contact. He liked to leave everyone in a good humor and made it a point to do and say things that would make a favorable impression on all with whom he had intercourse. As an example of this, it is shown that in telling candidates for office in Paducah that he could not vote for them, he gave as a reason that his home was in Tennessee in order to get rid of their importunities on the easiest terms and in such a way as not to give offense.

It is easily explainable why he paid his poll tax in Tennessee in 1901 and 1902, as it seems he did not leave there until some time in 1901, but why he should have paid a poll tax there in 1906 is not explained by the record. It is certain, however, that he did not pay any poll tax there in 1903 or 1904, or after 1906, and it is also shown in a very satisfactory way that after 1901 he did not cast a vote in the State of Tennessee.

If the place of Baker's residence had to be determined alone by intention manifested in speeches without any reference to the acts and conduct, that will presently be referred to, we would have little doubt in adjudging that he never lost his legal residence in Tennessee and only had an actual residence in Paducah for the purpose of conducting the business in which he was there engaged, all the while having it in mind to return to Tennessee when the objects of his sojourn in Paducah had been accomplished.

But when we turn to the other side of the case we find abundant reason for the opinion that, notwithstanding the "floating intention," as it is expressed in some of the cases, of Baker, he not only had an actual residence in Paducah, but acquired a legal residence there, which he retained until his death. He was not only actively engaged in business in Paducah for about eleven years continuously, but he actually resided there during the whole of this time and took an active part in the politics of the place. Several witnesses testify that he told them when candidates for office that he would vote for them, and after the election told them that he had voted for them. There is also evidence that he registered as a voter and paid a poll tax there. He was thoroughly identified with the social and business life of the place while he lived there, and, in short, so far as his acts and con-

duct were concerned, he was as much a citizen of Paducah as any other person who lived there; and about an hour before he died told the captain of the steamboat on which he was being carried on his expected visit to Savannah that "he was going to Savannah and would probably stay there until after the fair and was then coming back to Paducah and would vote for Wilson."

It is true he did not own a home in Paducah, but as he had no family except his wife, he probably thought, as do many other people so situated, that he could board with more comfort and less expense than he could keep house. He had no business interests in Tennessee except the land that had been given to him, and that was rented out. If, under these facts and circumstances, Baker could not be regarded as a citizen and resident of Paducah, it would be difficult to establish the place of legal residence on conflicting evidence.

For the reasons stated, we think the judgment dismissing the petition of Mrs. Josie Baker should be affirmed, as the effect of the order of dismissal was to adjudge that Charles Baker died a resident of Kentucky, and, therefore, his mother was entitled to one-half of his surplus personal estate in this State and his widow to the other one-half. It is true the judgment appealed from did not so decree, but it is evident that the court merely dismissed the petition instead of entering such a judgment because it was of the opinion that the judgment rendered in the suit of Mrs. Augusta Baker, as administratrix, against Mrs. Josie Baker sufficiently determined the rights of the parties, and it was unnecessary to again adjudge the matter. But, on a return of this case, the lower court will enter a judgment that Charles Baker died a resident of Kentucky, and that his mother, Mrs. Augusta Baker, is entitled to one-half and his widow, Mrs. Josie Baker, to one-half of his personal estate situated in this State at the time of his death, after the payment of his debts. The judgment should also direct Baker, Eccles & Company to cancel all certificates of stock issued by it to Charles Baker and to re-issue one-half of the shares to Mrs. Josie Baker and one-half to Mrs. Augusta Baker. Such other matters may be embraced in the judgment as will, after the payment of debts, distribute equally between the widow and the mother all other personal estate situated in this State of which Charles Baker died possessed.

Wherefore, the judgment is affirmed.

**Stallings, et al. v. Carpenter.**

(Decided February 11, 1915.)

## Appeal from Wayne Circuit Court.

1. **Principal and Agent—Secret Instructions—Effect as to Third Party.**—Secret or private instructions to an agent, however binding they may be as between the principal and agent, can have no effect on a third person who deals with the agent in ignorance of the instructions, and in reliance on the apparent authority with which the principal has clothed him.
2. **Contracts—Settlement of Accounts—Implied Acceptance.**—Where an agent is authorized by his principal to prepare a contract of settlement between the principal and a third party, and the contract is prepared and executed by the third party and returned to the agent, and the principal notifies the agent that he will not accept the contract because certain notes and checks were not returned by the third party, but this fact is never communicated to the third party, and the contract is retained by the agent for several weeks, during which time the property involved in the settlement is sold, and the third party is in no position to protect his rights, the principal is estopped to question the acceptance of the contract.
3. **Contracts—Settlement—Evidence.**—The terms of a written contract, and the circumstances under which it was executed, considered, and held that the contract was a complete settlement of the accounts between the parties thereto.

STONE &amp; BERTRAM for appellants.

DUNCAN &amp; BELL for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

On September 5, 1911, appellee, Rex G. Carpenter, who was the owner of an oil and gas lease, known as the Dobbs lease, on a 50-acre tract of land in Wayne County, transferred a five-eighths interest therein to the appellants, A. R. Stallings, W. T. Robinson and Robert Andrews. The contract provided that appellee was to drill and case a test well free of cost to appellants, but that after the test well was drilled and cased, each of the parties was to pay his *pro rata* share of any other expenses incurred in operating and developing the lease. The test well was drilled on January 26, 1912. In order to drill the well, appellee placed on the land about \$500 or \$600 worth of supplies, consisting of a gas engine, tank, water station, etc. Thereafter appellants advanced cer-

tain sums to appellee to pay their part of certain expenses incident to the development of the lease. These sums were not applied to the purposes for which they were sent, but appellee claims that as a matter of fact they were applied to the payment of other valid claims against the lease. During the month of April, 1912, appellee left the State to visit his sister, who was ill. Thereafter he went to McAlister, Oklahoma. While he was absent certain creditors who held claims against the lease brought suit and had attachment levied on the lease itself and on the supplies and fixtures thereon. A. J. Cress, an attorney, was appointed corresponding attorney to notify appellants and appellee, who were non-residents, of the nature and pendency of the suit. On May 22, 1912, appellant Stallings, acting for himself and the other appellants, Robinson and Andrews, employed Cress to represent them in the suit. Thereafter some correspondence passed between Cress and the appellants with reference to a settlement of the matter. On June 5th, Stallings wrote Cress that they wished to make the best possible settlement of the matter, "and as we are unable to find Mr. Carpenter will leave the entire matter in your hands." On June 14, 1912, Stallings wrote Cress as follows:

"What we wish to do is to have a conveyance of the interest of Rex G. Carpenter to us, and if this can not be done without sale of the property we will let it go to sale for the judgments now entered and then buy it at the sale. We wish to know if that can be done in the cases now pending. If you can have Rex transfer his interest to us in such manner that it will not be incumbered by any other debts he may owe we will pay off the judgments and the other claims as soon as that is done."

On June 25, 1912, Stallings wrote Cress as follows:

"I hope by this time you have succeeded in getting Carpenter to transfer his interest in the Dobbs lease to us and if so please let me know and we will forward the money to pay off all the claims. \* \* \* We want to get the matter closed up as soon as possible and if you have not yet succeeded in getting the transfer please speed it as much as possible."

On June 10, 1912, Cress wrote Carpenter that Robert Andrews had just left his office. The letter contains the following paragraph:

"They contemplate paying off the indebtedness and suing you on the overplus. I asked them if they would be

satisfied to square off with you if you would transfer to them your interest in the lease, and they agreed to quit on these terms. Think the matter over and see if you don't think that the thing to do, and if so, fix them up a transfer and mail same to me and I will hold it until an agreeable settlement can be reached, by which they sign up papers releasing you of anything which might come up against the property.

"Write me at once as Stallings will be here by the last of the week."

In response to this letter, appellee wrote Cress as follows:

"This letter authorizes you to draw up a transfer and send same to me to sign, stipulating the purpose for which it is given."

On June 15, 1912, Cress wrote appellee as follows:

"I am enclosing you transfer of remainder of Dobbs lease to Stallings, Robinson and Andrews jointly. In consideration of their indebtedness on the Dobbs lease, and the further consideration that you are released from any further liability on said lease."

The contract or transfer was executed by appellee on June 20, 1912. The material part of the contract is as follows:

"That whereas the said first party is indebted to the said second party in the sum of one dollar and other sums not herein mentioned, therefore in consideration of said indebtedness and as a full payment of same, the said first party sells and transfers, etc."

Appellee then mailed the contract to Cress, who received it a few days later. Cress made a copy of the transfer and sent it to Stallings. Stallings wrote Cress that they were unwilling to accept the transfer unless appellee returned to them two renewal notes for the sum of \$278 each, and two checks for interest amounting to \$5.57 each. The letter further stated that if the two notes, together with the interest checks, were returned, Cress could then put the transfer to record. If not returned they would let the property be sold at public auction and buy it in. Cress did not notify the appellee of appellant's refusal to accept the transfer. On July 22d, the property was sold and purchased by appellants. Appellee did not get back to Kentucky until August, 1912, when he learned for the first time that appellants had refused to accept the transfer, and that the property had

been sold and purchased by them. At that time he turned over to Cress the two notes for \$278 each, but did not return the two interest checks amounting to \$11.14, because the checks were for past interest which was due him.

On August 31, 1912, appellants filed separate suits to recover of appellee his *pro rata* share of the debts against the lease, and the other money which they claimed was owing to them. The actions were consolidated. Among other defenses, the appellee pleaded the transfer as a complete settlement and bar to appellants' right to recover. A trial before a jury was had, and a verdict rendered in favor of appellants. The judgment predicated on the verdict was thereafter set aside and the case referred to the master commissioner. After hearing evidence the commissioner reported that the transfer was intended to and did constitute a complete settlement of all accounts of every description existing between the parties, and that appellants therefore were not entitled to recover. Appellants' exceptions to the report were overruled, and judgment entered denying appellants any relief. From that judgment this appeal is prosecuted.

Two questions are presented: (1) Did the transfer become effective? (2) Did it release appellee from liability on the claim sued on?

(1) It is apparent from the correspondence of appellants that they were anxious to settle the matter by procuring a transfer from appellee of his interest in the lease. To this end they fully authorized Cress to act for them, as is shown by their letter of June 5th, wherein they placed the entire matter in his hands. It does not satisfactorily appear that before the transfer was sent to appellee for execution appellants notified Cress that they would not accept the transfer until the two notes for \$278 each and the two interest checks for \$5.57 each were surrendered by appellee. Even if they did, it is admitted that these secret instructions were never communicated to appellee. It is well settled that secret or private instructions to an agent, however binding they may be as between the principal and agent, can have no effect on a third person who deals with the agent in ignorance of the instructions, and in reliance on the apparent authority with which the principal has clothed him. *Givens v. Cord*, 44 S. W., 665; *Jones v. Shelbyville F., &c., Ins. Co.*, 1 Metc. 58; *Shelbyville v. Shelbyville*,



&c., Turnpike Co., 1 Metc., 54. Though a special agent employed for a particular purpose, Cress was clothed with general authority for the accomplishment of that purpose. As the agent of appellants, he prepared the transfer in question. The transfer was signed and acknowledged by appellee and returned to Cress. Appellants then notified Cress that they would not accept the transfer until the notes and interest checks were surrendered by appellee. This fact was not communicated to appellee, nor was the transfer ever returned to him. Cress himself was authorized to accept the lease. Whether or not he or appellants had the right to reject it after it had been prepared by him and executed and returned, it is not necessary to decide. Certain it is that the circumstances demanded that he or appellants should have rejected the transfer within a reasonable time, considered in connection with the fact that the property was to be sold in certain judicial proceedings then pending. By retaining the transfer for several weeks, and failing to notify appellee of its rejection, or of any condition attached to its acceptance, until after the leased property was sold by the court, appellee was deprived of an opportunity to take steps to protect his interest in the matter, and appellants are in no position to question the acceptance, which must be conclusively presumed. We therefore conclude that the transfer became effective.

(2) As to the effect of the transfer there can be no doubt. The correspondence is admissible for the purpose of showing the consideration. The contract itself specified that "whereas the said first party is indebted to the said second party in the sum of one dollar and other sums not herein mentioned, therefore in consideration of said indebtedness and as a full payment of same, the said first party sells and transfers, etc." Cress's letter said: "I asked them if they would be satisfied to square off with you if you would transfer to them your interest in the lease, and they agreed to quit on these terms." In his letter accompanying the transfer he said: "I am enclosing you transfer of remainder of Dobbs lease to Stallings, Robinson and Andrews jointly. In consideration of their indebtedness on the Dobbs lease, and the further consideration that you are released from any further liability on said lease." Considering the language of the lease itself, and the correspondence relating thereto, we think it perfectly clear that the parties intended by the transfer to square their accounts, and that

appellee was thereby released from all indebtedness to appellants growing out of the lease or incurred in connection therewith.

Judgment affirmed.

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## **American Tobacco Company v. Commonwealth.**

(Decided February 11, 1915.)

### **Appeal from Franklin Circuit Court.**

1. **Corporations—Report to Auditor—Taxation.**—Where a corporation furnished all the information required, upon blanks supplied by the auditor, in its annual report of property owned and business transacted in Kentucky, for the purpose of license taxation, the fact that it also showed the amount of its issued capital stock does not signify a fraudulent intent to evade or mislead, as the law takes no consideration of its issued capital stock in arriving at the tax.
2. **Corporations—Assessment of—Board of Valuation and Assessment.**—The judgment and action of the Board of Assessment and Valuation as to values based upon the legal evidence then obtainable, and at hand, and as fixed by statute, when recorded in the proper tax list, is conclusive upon the State as well as against the tax payer.
3. **Taxation—What Not Omitted Property.**—Property that has been undervalued by the owner is not property omitted from taxation within the meaning of the statute.
4. **Corporations—Mistake in Determining License Tax.**—Where the Board of Assessment and Valuation in determining the amount of license tax due by a corporation, by mistake took for its basis of calculation the capital stock issued by the company instead of that which the law authorized it to show, the Commonwealth is entitled to recover the amount which, by reason of this mistake, it has been deprived of, although settlement has been made and receipt in full given.
5. **Corporations—Assessment of.**—Where a corporation reported all of its authorized capital stock, as required by law, and by mistake the Board of Valuation and Assessment failed to assess a portion of the same, the corporation can not be said to be delinquent and subject to the 20 per cent statutory penalty, but comes within the exception of Section 4260 of one who has duly listed his property.

GIBSON & CRAWFORD for appellant.

LESLIE W. MORRIS for appellee.

OPINION OF THE COURT BY JUDGE NUNN—Affirming in part and reversing in part.

In October, 1910, a revenue agent, in behalf of the Commonwealth, and under direction of the Auditor, brought this suit to recover the following items of taxes alleged to be due the Commonwealth, viz:

\$1,648.85 with interest from February 1, 1907;

\$1,282.43 with interest from February 1, 1908:

\$1,337.40 with interest from February 1, 1909;

\$1,337.40, with interest from February 1, 1910.

The petition also sought to recover 20% penalty. The amounts claimed are alleged balances due on license tax. The petition shows that they are unpaid as to each year because "the Board of Valuation and Assessment in assessing the annual license tax of defendant for said year, by mistake and oversight, ascertained and fixed said tax, calculating said annual license tax upon the *issued* capital stock of said company, instead of calculating it upon the *authorized* capital stock of said company, thereby proceeding upon an erroneous principle and adopting an improper mode and manner of estimating said annual license tax due by the defendant for said year, the result of which mistake and oversight upon the part of the Board of Valuation and Assessment, and fraud of the defendant—the American Tobacco Company—defendant escaped for said year the payment of an annual license tax upon the percentage of that part of its *authorized* capital stock omitted by the Board of Valuation and Assessment." It will be observed that this claim is for a license tax—not one for franchise nor for undervalued or omitted property—and it is conceded the error was made by the State Board. The Commonwealth recovered judgment in the court below for the amount sued for, including penalty.

The appellant, as a foreign corporation, doing business in this and other states, was subject to a license tax, under the provisions of Article 11, Kentucky Statutes, Section 4189. It promptly paid such sums as were fixed by the board and demanded by the Auditor. It is the difference between the amounts so paid and what it is claimed should have been paid under a proper calculation that the Commonwealth is seeking to recover in this action.

Section 4189c, Kentucky Statutes, provides that:

"Domestic and foreign corporations shall pay an annual license tax of thirty cents on each one thousand dollars of that part of their *authorized capital stock* represented by property owned and business transacted in this State, which shall be ascertained by finding the proportion that the property owned and business transacted in this State bears to the aggregate amount of property owned and business transacted in and out of this State."

Section 4189d provides:

"In order to ascertain the amount of taxes due and payable under the next preceding section, by such corporations now owning property or transacting business in this State, it shall be the duty of every such corporation to file with the Auditor of Public Accounts, on or before the 1st day of February, 1907, and on or before the same day annually thereafter, a written report, verified by the affidavit of the president or secretary of such corporation, showing:

"1. The name of such corporation, the name of the State or government under the laws of which it is incorporated, the date of incorporation, the place of its principal office in and out of this Commonwealth, the name and postoffice address of its president and secretary, the name and postoffice address of its authorized agent or attorney upon whom process may be executed, as provided by law, and the name and address of its officer or agent in charge of its business in this State.

"2. The total amount of its *authorized capital stock*.

"3. The value of the property owned and used by the company in Kentucky, where situated, and the value of the property owned and used by the company outside of Kentucky, the aggregate amount of business transacted by said company during the preceding year ending the 31st day of December, and the proportion of such business transacted in this State, and such other facts bearing on this matter as the Board of Valuation and Assessment may require.

"It shall be the duty of the Board of Valuation and Assessment, from such report and from such additional information it may require, to ascertain and fix that part of the *authorized capital stock* of such corporation upon which the license tax shall be based, as herein provided, and to fix the license tax of such corporation at the rate hereinbefore prescribed. The board may, in any case,

require such additional information as it may deem necessary to enable it to perform its duties herein; and it shall be the duty of the Auditor of Public Accounts to notify every such corporation of the amount so assessed by the board. The notice may be given as provided in Section 5 (4189c) hereof, and it shall be the duty of the corporation to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter, or not later than thirty days after final action by the board, should it grant a rehearing, which the board may grant upon application therefor, filed within thirty days after the date of such notice. Upon final action by the board it shall certify to the Auditor of Public Accounts the amount of such tax due from each and every such corporation."

The appellant made annual reports of everything required under this law, and the originals are a part of the record in this case. They show that the *authorized* capital stock was \$180,000,000. They show also the annual gross income for its whole business as well as for its business in Kentucky, together with the proportion its Kentucky income bears to its entire income. Also the total value of all of its tangible property, as well as the value of its tangible property in Kentucky, with the points in Kentucky where the property is located, and the proportion which the value of its Kentucky property bears to its entire property. The reports were made on printed forms supplied by the Auditor. In addition to showing all the facts called for and required by law, the appellant, with pen and ink, interlined a statement showing that its *issued* capital stock amounted to \$118,931,500. As to the *authorized* and *issued* capital stock, the same figures appear in each of the four reports in question. It is not contended that the appellant made a single false statement either as to amount of stock or business or value of its property.

Under the statutes referred to, it is the duty of the corporation to pay 30 cents on each \$1,000 of the proportionate part of its *authorized* capital stock which is represented by property owned and business transacted in Kentucky. That part of its authorized capital stock to be taxed is ascertained by finding the proportion which its property owned and business transacted in Kentucky bears to its aggregate property and business both in and out of the state. It was made the duty of the

Board of Valuation and Assessment to ascertain by the simple calculation prescribed in the statute, for each of the years named, what percentage its Kentucky business and property bore to the aggregate. But, instead of determining what per cent. of its *authorized* capital stock was taxable, as directed by law, it took the *issued* capital stock as a basis. In this way the mistake occurred. It stands as virtually admitted that the appellant only paid the amounts fixed by the State Board, and that it did not pay the amount intended by statute. The question presented now is, whether appellant should be compelled to pay the difference between what it did pay and what it should have paid.

While the petition claims that this was omitted property, and that the interlineation of the amount of *issued* capital stock was written by the appellant for the fraudulent purpose of deceiving the Board of Valuation and Assessment, we lay no store by either of these allegations. It cannot be maintained that the appellant omitted any property from assessment. It reported the amount of its *authorized* capital stock, and every other fact required by law. The Board of Valuation and Assessment accepted as true the facts reported; no further information was called for, and even now the Commonwealth offers no criticism as to value or amounts of anything set forth in the reports. The fact that appellant also showed the amount of its *issued* capital stock does not signify a fraudulent intent, and evidences no purpose to evade or mislead. It merely gave more information than was needed or required. In fixing a license tax the law takes no consideration of its *issued* capital stock, and the appellant was not called upon to state it. But if it did show its *issued* stock, as well as its *authorized*, there was still but one thing for the board to do, and that was to make the calculation upon its *authorized* capitalization.

This court has frequently held that when the proper assessing boards or officers, within the time and substantially in the manner prescribed by the statute, have acted in considering and fixing the valuation upon property liable to assessment for taxation, and the party to be taxed has asked no relief within the time allowed by statute for correcting their action, then, even if erroneous, that action is final. The judgment of the assessing board as to value, based upon the legal evidence then

obtainable, and at hand, and as fixed by statute, when recorded in the proper tax list, in the very nature of things, should be conclusive upon the State as well as against the taxpayer. *Coulter, Auditor, v. Louisville Bridge Co.*, 114 Ky., 42; *First National Bank v. Hopkinsville*, 128 Ky., 383; *Chicago, St. Louis & New Orleans Ry. Co. v. Commonwealth*, 115 Ky., 278; *Commonwealth v. C. & O. Ry. Co.*, 28 Ky. L. R., 1110; *Citizens National Bank v. Commonwealth*, 118 Ky., 51.

But the difficulty in applying franchise and property tax rules to this case is this, that in fixing a license tax the board has simply to ascertain the amount—not the value—of the *authorized* capital stock. The amount of such stock is not a matter of opinion. In laying the license tax, the value of the stock is of no consequence, and does not enter into their consideration. The board has no discretion and passes no opinion upon its value. All the cases cited by appellee have reference to franchise taxes. In such cases the board is required, from the facts reported by the corporation, to *fix the value of the capital stock of the corporation* and deduct the value of all tangible property assessed in this State. The remainder thus found is the value of the corporate franchise subject to taxation. It thus appears in taxing franchise that the board sits in judgment and makes an estimate of the value of its capital stock—not the amount of it—and the deductions from that value are the values assessed on tangible property.

Under these circumstances, it has been frequently held that the judgment and action of such boards and assessors is conclusive upon both the State and the taxpayer, unless relief is sought from an erroneous assessment within the time allowed by statute for correction. Likewise, it has been held that property that has been listed but undervalued by the owner is not property omitted from taxation within the meaning of the statute. *Commonwealth v. J. M. Robinson-Norton Company*, 146 Ky., 224.

In the case of *Commonwealth v. C. & O. R. Co.*, 28 Ky. L. R., 1110, it was held that the courts cannot enter into an inquiry as to what items the Board of Valuation and Assessment considered in fixing the total value of defendant's capitalization. But this has reference to cases involving the value of corporate franchise, when the board erroneously omitted, or considered of no value,

certain items contained in the corporate report. The court would not upon appeal attempt to correct the judgment of officers whose duty it is, under the law, to estimate or fix taxable values. Where the property was actually reported or listed or assessed for taxation, it cannot be said that it has been omitted merely because undervalued. For that reason, in an attempt to recover license tax, or tax on omitted property, it is incompetent to show that the board undervalued or considered as of no value certain reported items.

As is said in the case of *Citizens National Bank of Lebanon v. Commonwealth*, 118 Ky., 51, with reference to a franchise tax:

"It was the duty of the Board of Equalization to assess the property for the years involved at its fair cash value, but the fact that they assessed it too low may not be remedied in a judicial procedure. Both the State and county, in this regard, are bound by the action of their fiscal officers."

None of the cases cited dispose of the question here. In levying a corporate license tax, as in this case, the corporation reports its authorized capital stock, not the value of it. Of the amount authorized the board, in a ministerial capacity, and by simple mathematical processes outlined and directed by statute, ascertain what proportion of the authorized capital should pay a license tax in Kentucky.

There is no question of omitted property, because none was omitted; that is, all of it was reported or listed so that its proportion could be taxed. There was no undervaluation and the question of value does not enter into this case at all. The board, instead of performing its duty in the way directed by statute, made a mistake and took for its basis of calculation the capital stock *issued* by the company, instead of the stock which the law *authorized* it to issue. So we have a case of an obligation due the State and a receipt given in full satisfaction of it, when the settlement was made, and the amount was paid and accepted under a mistake. Not only a mistake of law, but a mistake in mathematical calculation. In such case, the Commonwealth is entitled to recover the amount which by reason of this mistake it has been deprived of. The payment and acceptance of the amount first assessed against appellant cannot be regarded as an accord and satisfaction. Where a party by



mistake of law or fact, or both, cancels a claim or accepts part payment, or pays over money to another, he may in general recover it. We see no reason why the doctrine should not be applied to this case. Newman on Pleadings and Practice, Sec. 162d; Stengel v. Preston, 89 Ky., 623; 1 Cyc., 339.

Under these circumstances, does the law impose a penalty on the appellant? Section 4260, defining the powers and duties of revenue agents, says that he shall "cause to be listed for taxation all property omitted by the Assessor, Board of Supervisors, Board of Valuation or Assessment, or Railroad Commission, for any year or years, and is authorized to file suit to recover such."

The section further provides:

"All persons owning property which may be assessed as herein provided, shall, in addition to the taxes, pay the costs of the proceeding and penalty of twenty per centum on the amount of the State and county tax due, *except where such property shall have been duly listed by the owner thereof.*"

In providing for the penalty which the property-owner should pay, the statute makes an exception where the property shall have been duly listed by the owner thereof, and we are of the opinion, in fact, the reports so show, that appellant comes within this exception. It listed its property; that is, reported it, and no question is made as to the correctness of the report. On its report certain taxes were demanded, although it is clear that some of the property reported was omitted from taxation by the board, but such tax as was demanded was paid promptly and the appellant cannot be considered in default or as a delinquent.

For authority to collect the penalty appellee relies upon Section 4263 of the Statutes, which says, it shall be the duty of the revenue agent, when directed by the Auditor, as in this case, "to institute suit \* \* \* against any delinquent officer or other person to recover any money which may be due the Commonwealth; and, in all such suits \* \* \* in which judgment is recovered, the party in default shall, in addition to the amount in which he is liable to the State, be adjudged to pay a penalty of twenty per cent. of the amount due." But this section is to be read in connection with Section 4260, just quoted.

A delinquent officer or other person is one who has failed or neglected to perform some duty. We do not believe, under the circumstances of this case, the appellant can be so classed. The law makes it its duty to pay the license tax, that is, to pay after it has reported, and the amount of the license tax has been fixed by the Board of Equalization in the manner provided by law. It paid all that was fixed and demanded.

We are of the opinion that the appellant duly listed its property, and as to penalty comes within the exception.

For the reasons indicated, the judgment is affirmed as to the principal and interest and the cost, but as to the penalty of 20 per cent., it is reversed, with directions for the court below to enter judgment in accordance with this opinion.

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### **Goodrum. v. Flowers.**

(Decided February 11, 1915.)

#### **Appeal from Warren Circuit Court.**

**Appeal—Dismissal—Dismissal for Want of Jurisdiction by Court Sua Sponte.**—Where a judgment is for money only, and the amount is less than two hundred dollars, exclusive of interest and costs, under Section 950 Kentucky Statutes, the Court of Appeals has not jurisdiction to entertain the appeal.

**BRADBURN & BASHAM** for appellant.

**THURMAN B. DIXON** and **MAX B. HARLIN** for appellee.

**OPINION OF THE COURT BY JUDGE HANNAH—Dismissing Appeal.**

L. B. Goodrum was assessed for taxation in the county of Allen, in 1913, on property valued at \$3,600, the taxes amounting to \$55.80. Goodrum was not a resident of the county. J. N. Flowers, the sheriff of Allen County, failed to collect the amount in question, and was required to account for same as if collected by him. He then instituted this action in his individual capacity in the circuit court of Warren County, where Goodrum resides, to recover the \$55.80 as for money paid for him. There was a judgment in favor of the plaintiff, and defendant appeals.

It appears from the record that Goodrum had sold a tract of land in Allen County on October 28, 1911, and that \$3,600 of the consideration was represented by notes secured by vendor's lien retained in the deed. These notes he sold to the Potter-Matlock Trust Company, and with the proceeds he bought land in Warren County. No assignment, however, was made on the record in the office of the clerk of the county court, of the vendor's lien, and so the notes were listed and assessed as the property of Goodrum. The statute (Sec. 4051a, Kentucky Statutes), provides that unless the assignment of such notes was noted of record, the original holder is liable for taxes thereon as if no assignment had been made; but in *Schrader v. Semonin*, 123 Ky., 605, 96 S. W., 904, and in *Commonwealth, by etc. v. Crume*, 142 Ky., 180, it was held that if it should be made to appear satisfactorily that the assignee of the notes had in fact listed them for taxation himself, the assignor is thereby relieved.

It would seem that these cases are controlling to deny a recovery in favor of the plaintiff herein, the Trust Company being a Kentucky bank located at Bowling Green, in Warren County, and subject to taxation under and in the manner and to the extent fixed by law.

However, the judgment appealed from is for only \$55.80, and that presents a question whether the judgment is appealable.

2. It is contended by appellant upon the authority of *Willis v. Thornton*, 78 S. W., 215, 25 R., 1521, that as the present case involves a question of taxation, the judgment of \$55.80 is appealable.

The case of *Thompson Straight Whiskey Company v. Commonwealth*, 157 Ky., 393, was an ordinary action for the recovery of money due as a tax, and the judgment was for money only. In that case, as in this, it was contended that as the case involved a question of taxation, it was appealable regardless of the amount of the judgment. In that case, the court after an extensive review of the authorities held that as the judgment was for money only and the amount in controversy was less than two hundred dollars, the appeal should be dismissed. The case of *Willis v. Thornton* was distinguished upon the ground that the judgment therein was not for the recovery of money, but to enjoin the collection of a tax, the thing in controversy being not the amount of the tax, but the liability of plaintiff's property to be taxed as a particular district.

In the case at bar the judgment is for money only; the amount is less than two hundred dollars exclusive of interest and costs, and under the provisions of Section 950, Kentucky Statutes, as construed in the Thompson case, *supra*, this court has not jurisdiction to entertain the appeal.

Appeal dismissed.

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### Williamson, et al. v. Maynard, et al.

(Decided February 12, 1915.)

#### Appeal from Pike Circuit Court.

1. Wills—Vested Remainders.—A devise to one for life, and at his death to his children, then living, and those which may be born to him thereafter, creates a vested remainder at the death of the testator, in the children then living, and a vested remainder in each one of those born thereafter, as they come into being.
2. Wills—Life Estates—Contingent Remainders.—A devise to one for life, and at his death to his heirs, creates a contingent remainder in the heirs, because one can not have heirs until he is dead, and it is uncertain who his heirs may be.
3. Wills—Vested Remainders.—A vested remainder passes upon the death of the remainderman to his heirs, or to his vendee or devisee.
4. Wills—Remaindermen—Uncertainty.—The uncertainty as to whether or not the remainderman will live until the termination of the particular estate, upon which the enjoyment of his estate depends, does not make his interest a contingent one.
5. Wills—Construction—Intention.—The intention of the testator as to when an estate is to vest, is the rule by which to determine when it does vest, and this is to be determined by the terms used, and the rules established by the adjudications of the courts for construing devises.
6. Wills—Possession—Remainders.—The present capacity of taking possession, if the possession was to become vacant, distinguishes a vested from a contingent remainder.
7. Wills—Construction.—As a rule of construction, the words of the testator should be taken as expressing his meaning, unless it shall appear from the context, or from his will taken as a whole, that he does not use such words in their generally accepted meaning.
8. Wills—Contingent Remainders.—A contingent remainder is one limited, so as to depend on some event or condition, which is dubious or uncertain, and which may never happen or be performed.
9. Wills—Vested Remainders.—A vested remainder may be created in property devised to an executor for the use and benefit of

certain persons, if the devise has the other essentials necessary to create a vested remainder.

C. M. WHITT and ROBERSON & COOPER for appellants.

F. W. STOWERS for appellees.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

Benjamin Williamson, Sr., died a short time previous to February, 1879, domiciled in Pike County, Kentucky, leaving a last will and testament and codicil thereto, the construction of which, in part, is the subject of controversy in this action. His widow was named Esther Williamson. He also had a grandson whose name was Benjamin F. Williamson, and whose wife, yet living, also, bore the name of Esther Williamson. By the codicil to his will, the testator devised a portion of land to his widow, Esther Williamson, during her life, and another portion he devised the use and occupancy of to his grandson, Benjamin F. Williamson, during his life, and to Esther, the wife of Benjamin F. Williamson, if she should outlive her husband, during her life and widowhood. Esther Williamson, the wife of the testator, died after her husband, but a good many years ago. Benjamin F. Williamson and his wife, Esther Williamson, have several children, whose names are Clint Williamson, Mary Smith, and Floyd Williamson, who are yet alive. They also had a son, C. W. Williamson, who is now dead, and who left no children. Benjamin F. Williamson and his wife, Esther, had a daughter, also, Laura T. Slater, who is now dead, but left one child surviving her, who is Benjamin Slater. Benjamin F. Williamson and his wife, Esther, are still alive.

In the will of Benjamin Williamson, Sr., as first published by him was clause seven, which related to his grandson, Benjamin F. Williamson, and his wife and children, and was as follows, namely:

“Seventh: All the lands I own on Long Branch and Lick Branch of Big Creek, I give to the children of my grandson, Benjamin F. Williamson (son of Mitchell). This devise is to his children now in being, and such as may be hereafter born to the said Benjamin F., and the said Benjamin F. may use and occupy the said lands for the sole purpose of supporting and raising and supporting his children to mature age, and for no other purpose, and in the event of his death, his wife may occupy it for

the same purpose so long as she remains an unmarried widow, but no longer. And the lands are charged with the payment of one thousand dollars to my estate, to be paid out of the rents and sales of timber from said lands, the parts from which the timber is taken and the rents devised, to be in discretion of the executor of this will. And as the children of Benjamin F. arrive at mature age or marry, they are each to be permitted to occupy convenient situations on the said lands, the one thousand dollars charged to be realized within three years."

The codicil to the will was as follows:

"I, Benjamin Williamson, Sr., of Pike County, Kentucky, do make, publish and declare this to be a codicil to my last will and testament, that is to say: All of paragraph the seventh, bequeathing my lands on the Long Branch and Lick Branch of Big Creek, is cancelled and the following is substituted in place thereof:

"I give and bequeath to my wife, Esther Williamson, all of the lands on the Long Branch of Big Creek during her life time, commencing from the upper end of the field, above the Ground Hog Hollow at a Mulberry, including all forks in said bounds from *their* to the head of the said Long Branch.

"In the event of her death to revert to the executor of this will, in trust for the children of Benjamin F. Williamson, as set forth below.

"To my grandson, Benjamin F. Williamson (son of Mitchell), I grant permission to use and occupy the following described land for the sole purpose of supporting himself, and raising and supporting his children to mature age, and for no other purpose, and in the event of his death, his wife may occupy it for the same purpose and of no other purpose as long as she remains an unmarried widow, but no longer. Said land to commence at the lower end of the Big Hill field and etc., etc. \* \* \*

"The remainder of the land I own on the said Long Branch, and likewise that portion bequeathed to my wife, Esther, at her death, and also that portion set forth to be occupied by Benjamin F. Williamson and wife, at their death, or in the event of the said Benjamin F. Williamson's death, and his wife marrying, as above stated, I give to the children of my grandson, Benjamin F. Williamson (son of Mitchell), this devise is to his children now in being and such as may hereafter be born to the said Benjamin F. This land to be in the discretion of the executor of this will, and as the children of the said Ben-

jamin F. Williamson arrive at mature age or marry, they are each to be permitted to occupy convenient situations on the said lands.

"The land I own on said Long Branch, below the boundary to be occupied by Benjamin F. Williamson, is reserved in the hands of the executor of this will for the purpose of paying taxes which have or may accrue on said lands, and to pay to the said Benjamin F. Williamson two hundred dollars to discharge such outstanding debts as may now be against him, and towards purchasing him a set of blacksmith tools. Also to pay the one thousand dollars chargeable to my estate as set forth in paragraph No. 10, of this will.

"To enable this executor of this will to pay said amounts, I have sold to my sons, Wallace J. and Floyd E., sufficient standing poplar trees on said Long Branch to make twenty thousand feet, linear, said trees to be choice and selected with a view to average when cut 31 inches in diameter or upwards, on the following conditions, viz.:

"This portion of my estate to be charged with fifty dollars for every thousand feet, linear, and the said Wallace J. and Floyd E. Williamson to pay for said timber at the rate of six cents per cubic foot for one-half of such timber at the mouth of said Long Branch. (The charge above mentioned \$50.00 on each 1,000 ft, to be retained by W. J. and F. E. Wmson.)

"Said Wallace J. and Floyd E. Williamson are granted the privilege to build dams in said Long Branch and the right of way over said lands to enable them to get said timber out.

"All rents and overplus that may accrue from the sale of this timber after discharging the obligations as set forth are to be retained and held in trust by the executor of this will for the benefit of the children of Benjamin F. Williamson at maturity. The lands I own on the Lick Branch of Big Creek, known as the Harman Reid Branch, are to be disposed of as set forth in paragraph the fifteenth of this will."

These provisions created a life estate in Benjamin F. Williamson and his wife, Esther Williamson, to be terminated by their deaths, or by the remarriage of Esther Williamson, if she should outlive her husband, in the portion of the lands described in the clause of the codicil devising to them the use and occupancy of such lands.

C. W. Williamson, who was a son of Benjamin F. Williamson, married one Minnie V. Maynard, and after

the death of Esther Williamson, the widow of the testator, C. W. Williamson, upon his own motion, or by the direction of the executor of the will, it does not appear which, moved upon the land that had been devised to Esther Williamson, widow of the testator, during her life time, and lived thereon until his death. He left no children nor heirs at law, other than his father and mother, but before his death he made and published a will, by which he devised all of his property to his wife, Minnie V. Williamson; and thereafter Minnie V. Williamson died intestate, leaving no heirs except her father, W. H. Maynard, and her mother Arminta Maynard, who, under the laws of descent, inherited her property received by her from any source, except from one of her parents or grand parents, in equal moities.

Since that time W. H. Maynard has died intestate, leaving as his only heirs at law his children, E. G. Maynard, Rush Maynard, Effie Day, Grover Maynard, Ida Maynard, Robert Maynard, Lesley Maynard, Virgil Maynard, and Inez Maynard. After the death of C. W. Williamson, his widow, Minnie V. Williamson, claimed to be the owner of an interest in all of the lands mentioned in the codicil of the will, by reason of a devise of same to her by her husband, C. W. Williamson. After her death, her father, W. H. Maynard, and Arminta Maynard, her mother, claimed to own the interest formerly owned by C. W. Williamson in the lands, by inheritance from their daughter, Minnie V. Williamson. Since the death of W. H. Maynard, his children are claiming to be the owners of the moiety, which they claim that their father, W. H. Maynard, inherited from his daughter, Minnie V. Williamson. Minnie V. Williamson, during her life time, and her father and mother since her death, have claimed the right given by the codicil to C. W. Williamson, to occupy a portion of the lands under that clause of the codicil which says: "This land to be in the discretion of the executor of this will, and after the children of the said Benjamin F. Williamson arrive at mature age or marry, they are each to be permitted to occupy convenient situations on the said lands."

As a result of the proceedings under a forcible entry and detainer warrant, in which W. H. Maynard and Arminta Maynard were the complainants, and Benjamin F. Williamson, the defendant, in the Pike Circuit Court, the Maynards acquired the possession of that part of the land which had been occupied by C. W. Williamson after



his marriage, it being the same land which had been devised by the testator to Esther Williamson, his widow, during her natural life. At this stage of the proceedings, this suit was filed in the Pike Circuit Court by Benjamin F. Williamson, and Esther Williamson, his wife, Clint Williamson, Mary Smith, and Floyd Williamson, his living children, against W. H. Maynard, Arminta Maynard, Benjamin Slater, a grandson of Benjamin F. Williamson, and Wallace J. Williamson, executor of the will of Benjamin Williamson, Sr., and by an amended petition since the death of W. H. Maynard, against his heirs, in which the plaintiffs pray a construction of the codicil to the will, and allege that the interest of C. W. Williamson in the lands in controversy was a contingent one, and that having died before the life tenants, his father and mother, that he had no vested interest in it, and that his will conveyed nothing of the lands to his widow, Minnie V. Williamson, and that the Maynards, who claimed by descent from her, were not lawfully in possession of the portion of the lands held by them, and had no right or title to any interest in the land. They, furthermore, allege that the children of Benjamin F. Williamson who may be alive at the termination of the life estate of Benjamin F. Williamson and his wife, are the owners of the remainder interest in the lands, and would take same in fee simple at the termination of the life estate of Benjamin F. Williamson and his wife, Esther Williamson; and that under said will and codicil a partition of the lands cannot be had until the death of Benjamin F. Williamson and his wife, Esther Williamson. It is also alleged by the plaintiff that the executor of the will is entitled to the control of the lands, subject to the terms and provisions of the codicil, but just how far, and to what extent he had control, they are not advised, and they ask the court to construe the will and codicil, that the respective rights and claims of all parties to the suit be definitely ascertained and fixed, and to determine what rights, if any, the Maynards have in the lands, and whether or not the lands or any portion of them can now be divided, and between what persons. The defendant Maynards interposed a general demurrer to the petition and amended petition, and upon a hearing, the court adjudged that the will and codicil created in each of the children of Benjamin F. Williamson a vested remainder, and that C. W. Williamson had an interest which he could devise by will, and that the question of possession and occupancy had been determined

by the forcible detainer proceedings, and as there had been no appeal from the judgment in that case, that it was binding on the court, and that the issue as to occupancy could not now be raised; that a partition of the lands could not be had until the death of Benjamin F. Williamson and wife; that the demurrer should be sustained. To this the appellants excepted, and prayed an appeal to this court.

We presume that the charges made by the testator against the part of his estate mentioned in the codicil, have all been removed in the manner therein directed, as there is nothing said upon that subject in the petition.

It seems that the prime question to be determined on this appeal is the character of the estate, if any, had in the lands by C. W. Williamson. If the interest, owned by him, was vested before his death, he had such an ownership in the property as would pass by will to his devisees, or by the law of descent, if he had died intestate; but if his interest in it was a contingent remainder and contingent upon his living longer than his father and mother, who were two of the life tenants upon a portion of the land, and having died before the termination of their life estate, he would have had no interest of any kind in the land which would pass by descent to his heirs, if intestate, or that he could devise by will, if he died testate, as he did.

The intention of the testator as to when an estate devised is to vest, is the rule to determine, when it does vest, and this is to be determined by the terms used, and the rules established by the adjudications of the court for construing devises. *Grigsby v. Breckinridge, et al.*, 12 B. M., 629.

In the case of *Johnson v. Jacob*, 11 Bush, 656, it is said: "A vested remainder is a vested interest to take effect after a particular estate is spent. It is an actual estate and may be sold and the title thereto passed to the purchaser."

In the case of *Grigsby v. Breckinridge, supra*, it was also held: "That a vested remainder may be valid to take effect upon the determination of a particular estate, and that it may vest before the happening of the event which gives the right of possession."

This court has also held that the present capacity of taking effect in possession, if the possession was to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder

determines, universally distinguishes a vested remainder from one that is contingent. *Bowling v. Dobyons*, 5 Dana, 442; *Williamson v. Williamson*, 18 B. M., 368.

It is, furthermore, a well settled rule that it is not the uncertainty of the remainder interest, ever taking effect in possession, that makes a remainder contingent. A contingent remainder has also been defined to be a remainder limited, so as to depend on an event or condition which is dubious or uncertain, and which may never happen or be performed. *Johnson v. Jacob*, *supra*.

In the case of *Turner v. Patterson*, 5 Dana, 292, the devise was: "To my daughter, Catherine Patterson, I give her and her children the fifty acres of land they now live on, to each an equal part."

In that case, although there was not, as in this case, an expressed devise to the children then in being, as well as those that might be born thereafter, this court held, that in as much as the fifty acres of the land was all that was given to the mother, that she had a life estate therein, and that each of the children, whether then born or born thereafter, under that devise, had a vested remainder interest, and not a contingent one.

The court in that case used this language: "Upon the testator's death, the remainder vested, *eo instanti*, in the children then living, because there is nothing in the will indicating a different intention, and because the law does not favor such a construction as will make a devise executory or contingent, and persons able to take a vested remainder were in existence when the life estate commenced. But, as there is nothing in the devise which can restrict the remainder to the children in whom it first vested, and as 'children' without qualification or limitation, included such as were born after the death of the testator, as well as those then living, the remainder opened and vested in each subsequent child as it came in esse; and having thus once vested in all of the children born during the particular estate, it did not survive upon the death of any one of them, but descended to the legal heir of such decedent."

In the case at bar, the lands devised in the codicil of the will all seem to adjoin. The lands devised to the widow of the testator, Esther Williamson, during her life time, at her death vested in the executor of the will for the use and benefit of the children of Benjamin F. Williamson. The testator then proceeds to set apart another boundary of the land, which he describes by

metes and bounds, upon which he grants permission to his grandson, Benjamin F. Williamson, to occupy and use as long as he lives for the purpose of maintaining himself and his children until they should arrive at years of maturity, and in the event of his death, to his wife Esther, if she then be living, for the same purpose so long as she may live, or she ceases to be a widow. He then bequeaths the lands which he has devised to his wife, Esther, for life, at her death; and the portion that he set apart for the use of his son, Benjamin F. Williamson, and his wife, at the death of the longest liver of them, or the remarriage of his wife, if she shall live the longer, as well as all of the other lands not included in these two portions, which he owned on Long Branch, to the children of Benjamin F. Williamson, to those then in being and such as might thereafter be born to the said Benjamin F. Williamson. He then directs that all of these lands shall be under the control and direction of his executor, and as the children of Benjamin F. Williamson arrive at mature age, or marry, they are each to be permitted to occupy convenient situations upon the lands. He then devises the lands owned by him on Long Branch, below the boundary that was set apart to Benjamin F. Williamson for life, to his executor for the purpose of paying taxes, which had or might thereafter accrue on the lands, and also to pay to Benjamin F. Williamson, two hundred dollars, and to discharge the one thousand dollar charge which he had settled upon this land.

It will be noted that in this codicil the word heirs of any person, nor issue of body, nor bodily heirs, or any similar words of any kind are used. The testator used the word children in every instance. Neither is there anything in the codicil, or in the entire will, which could lead to the conclusion that in the codicil he used the word children with the meaning attached to the word heirs. As a rule of construction, the words of the testator should be taken as expressing his meaning, unless it should appear from the context, or from his will taken as a whole, that he does not use such words with their generally accepted meaning. A different rule applies in determining whether a remainder interest is a vested or contingent one when the word children is used in describing the remaindermen, from the rule which prevails when the word heirs is used as descriptive of the remaindermen.

The cases relied upon by appellants as showing that the remainder interest attaching to the children of Ben-

jamin F. Williamson is a contingent interest and not a vested one, are the cases of *Williamson v. Williamson*, 18 B. M., 329; and *Runyon v. Hatfield, et al.*, 157 S. W., 17.

In these cases it was held that the remainder interest in litigation was a contingent one, but in each of these cases the remaindermen were described as the heirs of the life tenant, and not as children of the life tenant.

The courts have held that where a devise to a certain person for life, and at such person's death to his heirs, the estate in remainder does not vest until the death of the life tenant, because no living person can have heirs, and in addition to that, there can be no certain way of knowing who any person's heirs may be until the death of such person, as the heirs may be all collaterals, and far removed from the life tenant in point of blood or may be in the ascending or descending scale; but by the adjudicated cases, the great weight of authority is, that where a devise is to one for life, and at his death to his children, that it creates a vested remainder in the children upon the death of the testator unless the entire will taken as a whole should show that the testator makes use of the word children, when he means and intends heirs. *Turner v. Johnson's Executors, et al.*, 160 Ky., 611. In the case at bar, the codicil describes some of the children of Benjamin F. Williamson to be then in being, and the petition does not disclose the fact, if any of them were born after the death of the testator. If they were all in being at the death of the testator, then each of them was capable of taking possession of the lands, if the life tenant should die, and in the light of the case of *Turner v. Patterson, supra*, if any of them were born after the death of the testator, the remainder interest would open and vest in each one of those subsequently born. The mere fact that the right of the remainderman to enter into the possession of the property is contingent upon his living longer than the life tenant, is not such a contingency as makes the remainder a contingent one, but it is the present capacity to take possession, if the life tenancy should expire, that determines whether the remainder interest is a vested or contingent one. *Bowling v. Dobyns*, 5 Dana, 442.

The fact that any one of the children of Benjamin F. Williamson might probably die before the end of the life tenancy, would not make the remainder interest owned by such child a contingent one. It appears from the entire will and codicil that the testator did not intend

to leave any portion of his estate undisposed of, and to each branch of his family he devises the portion of his estate which he intended should pass to such branch of the family; and it is, furthermore, to be observed that in the codicil he abstains from making any disposition of the remainder interest which he devised to his great grandchildren, the children of Benjamin F. Williamson, in the event of the death of any one of them without leaving children. It cannot be presumed that the testator contemplated that one of the remaindermen would die before the ending of the life estate. It cannot be presumed without actual words to the contrary that he did not intend that the interest which he devised to the remaindermen should not be a vested one. It further appears that Benjamin Slater, one of the defendants in this case, is a son of one of the children of Benjamin F. Williamson, who died before the life tenancy expired. According to the rule insisted upon by the appellants in this case, and if that view should prevail, this infant appellee would be deprived of any portion of the lands in controversy, because his mother died before the life estate expired, and if she acquired no interest under the will of her great grandfather, she had no interest to pass to her heirs, and it should not be presumed that in view of the fact that in the other clauses of the will the testator made particular provisions to secure some portion of his estate to all of his other descendants, that he intended that this one should receive nothing. The fact that the lands are to be held by the executor of the will for the use and benefit of the remaindermen does not prevent the remainder interest from vesting upon the death of the testator, nor make such interests contingent ones.

We are therefore of the opinion that the interest acquired by C. W. Williamson, under the will and codicil, was a vested one, although the quantity of his interest can not be determined until the expiration of the life estate enjoyed by Benjamin F. Williamson and his wife, Esther Williamson, under the provisions of the will and codicil. Such interest being a vested remainder, passed by his will to his wife, Minnie V. Williamson, and upon her death, intestate, passed to her heirs. A right to occupy some portion of these lands after he became married, was also a right which C. W. Williamson had under the provisions of the codicil, and that right likewise passed by his will to his devisee, and by the laws of descent, from her to her heirs.

The testator having in three places in the codicil provided that the lands mentioned in the codicil should be under the direction and control of the executor of his will for the use and benefit of the remaindermen, and expressly providing that the title to that portion devised to his widow, Esther Williamson, for life, should at her death revert to his executor, and the further reason that the codicil provides that the remaindermen, upon arriving at years of maturity, or becoming married, shall be permitted to occupy convenient situations on the lands, and does not provide that any portion of it shall be allotted to them in severalty; and for the reason that no practical division can be made until it can be definitely known how many children Benjamin F. Williamson may have, and which can not be known until his death, leads us to the conclusion that no partition of the lands between the remaindermen can be had, or was intended by the testator, until the expiration of the life estates of the father and mother of the remaindermen. Such of them as may arrive at years of maturity, which time we deem to be when they become twenty-one years of age, or shall marry, will be entitled, in the discretion of the executor, to be exercised by him in a just and equitable way, so as to carry out the intentions of the testator, to occupy some portion of the land, outside of the portion devised to Benjamin F. Williamson and his wife for life, upon such terms as to quantity and location as may be equitable between them, and the heirs of such of them as may die before the death of Benjamin F. Williamson and his wife, or her remarriage after his death, if she should live the longer, and the vendees of such of them as may sell their interests before the termination of the life estates above mentioned, will be entitled to the same privilege, but such privilege of occupancy and use, nor the judgment as to the possession in the forcible and detainer proceedings, will not affect the rights of the parties to an equitable division of the lands at the termination of the said life estates.

It is therefore adjudged that the judgment appealed from be affirmed.

**Chesapeake & Ohio Railway Company v. Mellon,  
Police Judge.**

(Decided February 12, 1915.)

**Appeal from Floyd Circuit Court.**

**Municipal Corporations—Ordinances—Uncertainty.**—An ordinance of a town prescribing a punishment for its violation, must be sufficiently certain as to the portion of the town where it is intended to be in force, that persons may know certainly when they have violated it, or else it is void for want of certainty.

**WORTHINGTON, COCHRAN & BROWNING and HARKINS & HARKINS** for appellant.

**J. C. HOPKINS** for appellee.

**OPINION OF THE COURT BY JUDGE HURT—Reversing.**

Prestonsburg is a town of the fifth class, and the county seat of Floyd County, Kentucky. It has a population of about 2,000 people. A part of the town is situated upon one side of the Big Sandy River, and a portion of it upon the other side. The means of communication between the two portions of the town is a bridge over the Big Sandy River. From this bridge along the Big Sandy River to the limits of the corporation going toward the south is a distance of something over 1,200 yards. From this bridge to the limits of the corporation going toward the north, is something over 1,000 yards. From this bridge going toward the south to a point called the underground crossing, is about 530 yards. The appellant, Chesapeake & Ohio Railway Company, has a line of railroad extending along and near to the Big Sandy River, on the side opposite to the main portion of the town of Prestonsburg, the entire distance above given, which amounts to something over 2,200 yards. A county road is situated along near the river, entering the corporate limits at the south, and continuing to a point about 425 yards north of the bridge across the Big Sandy River, where it crosses the railroad track and goes to that portion of Prestonsburg, which is situated on that side of the river. This road from the underground crossing running north and passing the bridge and on to where it crosses the railroad, between the bridge and depot, is called Floyd Street. The railroad depot is about 700 yards north of the bridge and adjoins a portion of Prestonsburg



which is on that side of the river, containing about 400 or 500 inhabitants.

The city council of the town of Prestonsburg duly adopted and published an ordinance prohibiting the running of a railroad train, or any locomotive, or car between the underground crossing and the bridge, at a greater rate of speed than seven miles per hour, under a penalty of a fine to be imposed upon any railroad, corporation, or company, or any person, so doing, of not less than fifty dollars, nor more than one hundred dollars for each offense. At the same time the council of the town adopted and published an ordinance, which is in words as follows, namely:

“The city council of the city of Prestonsburg do ordain, as follows: That it shall be unlawful for any railroad company, or any company maintaining or operating any railroad, or any workman, or agent, or employee of any railroad company, or any person operating any railroad, or maintaining same, to run any freight train or passenger train, or train of any kind, or description, or any car, or cars whatever, or any locomotive upon or near Floyd Street in said city, and between the bridge as now located across the Big Sandy River, and the line of the said city limits, or for any distance whatsoever between the points above mentioned at a greater rate of speed than at the rate of six miles per hour, and any such railroad company, or corporation, or person, or persons, workman, agents, or employees thereof, found guilty of violating this ordinance, shall upon conviction, be fined not less than fifty dollars, nor more than one hundred dollars for each offense.”

The appellee, W. T. Mellon, who was the Judge of the Police Court in Prestonsburg, after the adoption of these ordinances, issued warrants against the appellant, charging it with a violation of these ordinances, and was proceeding to cause it to be tried upon the warrants, when the appellant filed its petition in the Floyd Circuit Court against the appellee, in which it alleged that the ordinances were unconstitutional, illegal, unreasonable, and void, and asked for a writ of prohibition against the appellee prohibiting him from enforcing the ordinances as against appellant. The appellee filed an answer controverting the allegations of the petition, and an issue being made up, considerable proof was taken by each party, and the court upon a hearing, adjudged that the ordinance prohibiting the movements of trains and loco-

motives and cars upon appellant's road between the underground crossing and the bridge across Big Sandy River, at a greater rate of speed than seven miles per hour, was unreasonable, and that the writ of prohibition prayed for as to that ordinance be awarded against appellee and his successors in office, prohibiting him and them from enforcing the ordinance. The judgment of the court as to this ordinance has not been appealed from, and is not before us for determination. The court, however, adjudged that the ordinance limiting the speed of trains, cars, and locomotives from the bridge over the river to the limits of the town, and which is set out in full above, was reasonable and within the authority of the council to adopt, and refused to grant the writ of prohibition against the appellee prohibiting the enforcement of that ordinance, as prayed for in the petition. From this judgment the appellant has prayed an appeal to this court.

It is unnecessary for a proper determination of this cause to enter into any discussion as to the power of the council of Prestonsburg to adopt and enforce such an ordinance, or as to whether or not under the proof presented, it is a reasonable or unreasonable requirement to prohibit the movement of trains, cars, and locomotives at a greater rate of speed than six miles per hour, because we have arrived at the conclusion that according to the language of this ordinance, that it is void for the want of certainty.

It appears from the testimony in the transcript before us, that it is something over the distance of 1,200 yards from the bridge over the Big Sandy River to the line of the corporate limits of the town in one direction, and from the bridge to the limits of the corporation in the other direction is something over 1,000 yards, and this ordinance does not by its terms state upon which side of the bridge it shall be unlawful to operate a train or cars at a greater rate of speed than six miles per hour. There is nothing in the ordinance by which any one could say whether the running of trains between the northern limits of the town and the bridge was prohibited, or whether the prohibition was in that portion of the town between the bridge and the southern limits of the town. It is apparent from the enactment of the first mentioned ordinance, which was held to be unreasonable by the circuit court, that it was not the intention or purpose of the council to make this ordinance apply in every direction

from said bridge, to the corporate limits of the town, and as it now stands it would impose a punishment upon persons who were never intended to be made amenable to the penalties prescribed by the ordinance. To say that it means to apply in each direction from the bridge to the limits of the town, would be to hold something which the municipal authorities never intended.

In 28 Cyc., 351, in defining the fundamental rules of municipal legislation, one of them is, which requires an ordinance by fair and natural construction to convey a reasonable certainty of meaning, and on page 354 it lays down one of the fundamental essentials to a valid ordinance is, that it must be certain to a common intent.

An ordinance is a law of the municipality, and those who must obey it, as well as those whose duty it is to enforce it, must be able to know when it has been violated.

In the light of the evidence in this case, the place wherein this ordinance is expected to be in force is uncertain. The rule requiring a statute or municipal ordinance to be sufficiently certain as to the place of its operation, that persons who are expected to obey it will know when they have violated it, is so fundamental and of such general acceptance, that no argument is necessary to support it.

The judgment appealed from is therefore reversed and this cause remanded with directions to proceed in conformity with this opinion.

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### **Ramsey v. Ramsey.**

(Decided February 12, 1915.)

#### **Appeal from Pike Circuit Court.**

1. **Divorce—From Bed and Board—Grounds For.**—Where a divorce a vinculo is sought by the wife on the ground that the husband habitually behaved towards her for not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her, and to destroy permanently her peace and happiness, although the evidence may not show any act of violence committed by the husband upon the wife, threats of violence, or punishment actually inflicted by him upon her, if it conduces to prove that the conduct on his part complained of is of such a character as to show that he is lacking in affection for her, and so ill-tempered toward her as to manifest a total disregard of the marital relation, and the unhappiness thereby caused the

wife would equal in cruelty actual punishment inflicted upon her, such evidence will at least authorize the granting to her by the court of a divorce from bed and board.

2. Divorce—Discretion of Court as to Granting.—Section 2121, Kentucky Statutes, confers upon courts of equity the power to grant a divorce from bed and board for any of the causes which allow divorce, or for such other cause as the court, in its discretion, may deem sufficient. The discretion thus allowed the court is not arbitrary or unlimited, but a sound discretion and one to be exercised for such causes as may be deemed to be sufficient, when considered with a just and reasonable regard to the legal rights and obligations of both parties.
3. Divorce—Alimony—When Allowed—Amount of.—If entitled to a divorce from bed and board, the wife is likewise entitled to alimony, and where it is made to appear from the evidence that the husband's earnings as a locomotive fireman amount to not less than \$70.00 and occasionally as much as \$100.00 per month, he should be required to pay the wife at least \$25.00 per month for her support, and \$10.00 per month, in addition, for the support of their infant child, two years of age.

J. S. CLINE for appellant.

J. M. BOWLING and ROSCOE VANOVER for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This action was instituted by the appellant, Minta Ramsey, against the appellee, Don Ramsey, for a divorce *a vinculo*, alimony, and the custody of their infant child. The grounds alleged in the petition for the divorce were the abandonment of appellant by appellee for one year, failure to provide her a support, that appellee habitually behaved towards her for not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness; and such alleged cruel beating or injury and attempted injury of appellant by appellee as indicated an outrageous temper in him and probable danger to her life, or great bodily injury, from her remaining with him.

Appellee filed an answer of two paragraphs, the first containing a traverse and the second alleging, in substance, that appellant had abandoned appellee and his home without cause; that he had properly provided for her and their child and in other respects faithfully performed his marital duties toward her, in many instances going beyond his financial ability in gratifying her wishes, at one time making her a gift of a diamond ring

and gold watch, the ring costing him \$160.00 and the watch \$23.00. He did not, however, make his answer a counter-claim or ask a divorce.

Appellant's reply controverted the affirmative matter of the answer, except its averments as to the gift of the diamond ring and gold watch, and alleged that these articles were given her by appellee before their marriage.

The circuit court refused appellant a divorce and rejected her claim to alimony, but gave her the custody of the child and required appellee to pay \$10.00 per month for its support; and also to pay a \$75.00 *pendente* allowance previously adjudged appellant. From the judgment entered pursuant to these rulings the latter has appealed.

Much of appellee's evidence tended to prove that appellant was irritable in her conduct toward him, often complained of him without cause, and was unreasonably exacting in her demands upon his time and purse; and, further, that he provided for her to the best of his ability, and, to that end, often, at her command, handed to her as much as a month's earnings at a time. Some of appellee's evidence, however, conduced to prove that he was frequently impatient with her, found fault with what she did and sometimes addressed her in offensive terms and with a display of temper that was unbecoming in a husband.

In giving her deposition appellant admitted that she at the end of the month had often demanded of appellee his month's wages and that, in some instances, he had given them to her; but she said such demands were made to prevent him from spending the money for whiskey, which he often drank to excess, and that her purpose in thus obtaining his wages was to use them for the benefit of the family. Other evidence furnished by appellant and her witnesses conduced to prove appellee's surliness of temper, his refusal of her requests for money for the use of herself and child, and that he frequently, without provocation, spoke to appellant in abusive and offensive language. This, according to the testimony of herself, her father, mother and another witness, he once did at her father's house, where she had gone after a quarrel with him, on which occasion, when told by her father that appellant had informed him of his mistreatment of her, he said she was a "damned liar." Another witness

in addition to appellant, testified that she on one occasion at appellee's home heard him say, in a fit of anger following a quarrel he had with appellant, that he would shoot both her and himself; and that at the time of making this statement he had a pistol in his hand, which he did not, however, attempt to use.

We will not discuss in detail the evidence bearing on the grounds for divorce. As in all hotly contested divorce cases, it is conflicting and much of it exaggerated and improbable. Considered as a whole, it shows that appellant since her marriage, which occurred when she was but seventeen years of age, has been so afflicted with ill health that it has in large measure interfered with her performance of the household and marital duties usually expected and required of a wife, and such ill health has also so affected her disposition as to make her at times irritable toward and fault-finding with appellee, as well as exacting in her demands upon him. It is also apparent from the evidence that appellee is a young man possessed of robust health and much animal vigor; that he is coarse-grained and undemonstrative in disposition, also resentful of appellant's ill health and irritability, as well as surly in his bearing toward her. It can well be understood how collisions may occur and marital difficulties arise between two persons of such antagonistic physical and mental qualities, and how the daily occurrence of such difficulties would result in much unhappiness to each of them.

In our opinion, the evidence fairly analyzed fails to establish appellant's right to a divorce *a vinculo*. It falls short of proving the alleged abandonment of appellant by appellee, and, on the contrary, shows his ability to provide her a home and support and his unwillingness to have her remain away from him. It also shows that, though appellee often failed to treat appellant with the affection and consideration to which she was entitled, his behavior toward her was not so habitually cruel or inhuman for six months or any considerable time, as to indicate a settled aversion to her or destroy permanently her peace and happiness; and there was no proof whatever of beating, physical injury or attempted injury of her by appellee that indicated probable danger to her life or great bodily harm to her from remaining with him. In reaching this conclusion we do not overlook the threat shown to have been made by appellee to shoot

himself and appellant; but, as this was the only demonstration of violence ever made by him toward appellant, and his conduct at the time clearly showed the absence of any intention on his part to execute the threat, we are convinced that what he then did and said was a mere game of bluff, resorted to for the purpose of preventing appellant from leaving him as she, in a heated quarrel that then arose between them, threatened to do.

If appellant had been substantially without fault in respect to the matters complained of in the petition, we would be more inclined to grant her the relief asked; but the fault has been partly hers, for she has often been irritable and exacting with appellee when she should have been kind and forbearing. On the other hand, appellee has been more in fault; for, unmindful of her frailness of health and its irritating influence upon her temper, he has treated her with harshness when he should have been gentle and sympathetic; and by his surliness of demeanor and outbursts of temper she has been led to believe that he no longer loves or respects her. We think it manifest from the evidence that appellant yet has an affection for appellee, and while she has at times so acted as to try his patience, such conduct was due to her ill health, of which he had full knowledge before and at the time of his marriage to her. It may be that appellant has not entirely lost his affection for her, but it is apparent from the evidence that it has so waned as to render him indifferent to her happiness and inexcusably harsh in his treatment of her. Although we would be unwilling to declare that the chancellor, on the state of case presented, erred in refusing the absolute divorce asked by appellant, she was entitled to some relief, and this should have been given her in the form of a divorce from bed and board and alimony, such power being conferred upon the court by Section 2121, Kentucky Statutes, which provides:

“Judgment for separation or divorce from bed and board may also be rendered for any of the causes which allow divorce, or for such other cause as the court in its discretion may deem sufficient.” *Zumbiel v. Zumbiel*, 24 R., 590; *Evans v. Evans*, 93 Ky., 510; *Irwin v. Irwin*, 96 Ky., 318.

The discretion here allowed the court is not arbitrary or unlimited, but a sound legal discretion, and one to be exercised for such causes as may be deemed to be

sufficient, when considered with a just and reasonable regard to the legal rights and obligations of both parties. In *Irwin v. Irwin*, *supra*, a divorce from bed and board was granted the wife upon a state of facts strikingly analogous to those of the instant case. In the opinion Judge Pryor, writing for the court, in part said:

"There never was any actual violence committed by the husband upon the wife, nor any threats of violence made, but such cruelty may be inflicted on the wife by exhibitions of a want of affection and a disregard of the marital relation as in its results or effect on the wife would exceed in punishment any blow that might be inflicted upon her person. It must be conceded that the defendant in this case is devoted to his children, and we are not satisfied the evidence before us presents such a state of case as would authorize a judgment *a vinculo matrimonii*, and thus destroy all hopes of reconciliation between these parties; and the statute designed to meet such a case as the one before us provides that 'a judgment from bed and board may also be rendered for any of the causes which allow a divorce, or for such other cause as the court in its discretion may deem sufficient.' This discretion is neither arbitrary nor unlimited, but must arise from a state of fact showing that a separation is demanded for the interest and protection of the life, health or happiness of the party complaining, on account of the conduct and treatment of the one in default. The wife not being entitled to a divorce *a vinculo*, it is proper to inquire upon what ground the separation from bed and board has been granted; for, if such a judgment is not authorized, it will affect the question as to which of the two is entitled to the custody of the infant children. \* \* \* The coldness and indifference on the part of the appellant towards his wife for several years succeeding the separation was such as to render her life almost intolerable, and, while his conduct cannot be said to be inhuman, it bordered on a degree of cruelty that must have tended to destroy her peace of mind and rendered her an unhappy woman.  
\* \* \* \*"

As the estrangement of the parties here concerned is not so great as to render a reconciliation hopeless, it may be that the separation resulting from a divorce *a mensa et thoro*, and the opportunities it will afford



for reflection, would enable each of them to so appreciate the better qualities of the other, and become so tolerant of his or her frailties, as to bring about a restoration of such marital relations as will secure the happiness of both.

If entitled to a divorce from bed and board appellant is likewise entitled to alimony; and, as it appears from the evidence, that appellee's earnings as a locomotive fireman amount to not less than \$70.00, and occasionally as much as \$100.00, per month, he should be required to pay her at least \$25.00 per month for her support and \$10.00 per month, in addition, for the support of their infant child, two years of age, whose custody was properly awarded by the circuit court to appellant. The alimony thus indicated is not deemed sufficient for the support of the wife and child, but it is as much as appellee should be required to pay, in view of his straitened circumstances; for it appears from the evidence that he owns no real estate and that the only personal property owned by him is a small quantity of furniture, upon which he is owing a part of the purchase price agreed to be paid for it.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to the circuit court to enter a judgment granting appellant a divorce from bed and board, the custody of the infant child, and alimony of \$25.00 per month for her own support and \$10.00 per month for that of the child. Of course, it will be proper for appellee to be required to pay the \$75.00, *pendente* allowance, as directed by the judgment appealed from.

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### Chesapeake & Ohio Railway Company v. Smith.

(Decided February 12, 1915.)

#### Appeal from Carter Circuit Court.

1. Railroads—Youth Fourteen Years Old Riding on Freight Train—Assisting in Unloading Light Freight.—It is neither intrinsically hazardous or obviously dangerous for a youth fourteen years of age to assist in unloading light freight from a freight car and placing it on depot platform; nor is it necessarily hazardous or dangerous for such youth to ride on the caboose of a freight train or to be permitted to do so.

2. **Railroads—Injury to Youth in Riding on Freight Train—Action for Damages—Peremptory Instruction.**—In an action for damages for injuries to a boy fourteen years old resulting from his becoming frightened and jumping from a caboose of a freight train upon which the conductor was permitting him to ride under his agreement to assist in unloading light freight, the injury to the boy occurring while he was not engaged in handling freight and his riding on the caboose not being necessarily hazardous or dangerous, there should have been a peremptory instruction to find for defendant.

SHELBY, NORTHCUTT & SHELBY, WILHOIT & WILHOIT and  
H. L. WOODS for appellant.

KOZEE & MORRIS and THEOBALD & THEOBALD for appellee.

OPINION OF THE COURT BY JUDGE TURNER—Reversing.

Prior to December, 1913, Sam Smith, the fourteen year old son of appellee, had been engaged as a laborer at the brick yards at Haldeman, Ky., a place in the eastern end of Carter County; believing that his son could procure better wages in the same employment at Hitchens, another point in Carter County where brick are manufactured, his father sent him there where he had another son employed in similar work. The boy went to Hitchens and failed to procure employment, and desiring to return home went to the station and seeing a freight train going in the direction of his home and recognizing the conductor thereof told him he desired to go back to his father's home, whereupon the conductor told him if he wanted to go home to get busy unloading freight. He did then assist the train crew in unloading the freight at Hitchens, and when the train started he got on the caboose.

At a point between Hitchens and his home one or two cars immediately in front of the caboose were derailed by reason of the spread of the rails, and Smith becoming frightened jumped off of the caboose and broke his leg.

This is an action by his father, the appellee, for damages by reason of the loss of services of his infant son, wherein it is alleged that the conductor in charge of the freight train permitted the said infant to ride on the said freight train and to render services thereon in handling freight, and that the said work was dangerous and hazardous, and that the said train was not used or equipped for carrying passengers or suitable for the same, and that the conductor of the train knew that the

said Sam Smith was at the time under the age of twenty-one years, all of which was without the knowledge or consent of the plaintiff, and that the boy received his said injuries by reason of the carelessness and negligence of the defendant and its agents in permitting his said son, without his knowledge or consent, to ride upon said train and remain thereon.

The answer was a denial of the material allegations of the petition, and in addition pleaded that upon the occasion in question the defendant had in charge of the train mentioned a full crew, including an engineer, fireman, conductor, and three brakemen.

The jury returned a verdict for the plaintiff for \$666.66 2-3 upon which judgment was entered and the company appeals.

The only question necessary to be considered is whether appellant, under the state of the pleadings and evidence, was entitled to a peremptory instruction.

The whole action is grounded upon the idea that the conductor employed the infant to do dangerous and hazardous work and permitted him to do the same in consideration of his transportation, knowing at the time of his infancy.

The boy testified that the freight he unloaded was "can goods and boxes and things," and that at the only station where they stopped previous to the accident he did not help to unload anything because "the freight was too heavy up there. They needed him at the next station, they said, where it was light."

It is perfectly manifest that unloading light freight is neither dangerous nor hazardous for a boy fourteen years old, and it is likewise apparent that the mere act of riding on a caboose of a freight train is neither dangerous nor hazardous in the ordinary sense. The boy was not injured while actually engaged in loading or unloading freight; but was injured while being permitted to ride on the caboose, which we have seen is not necessarily hazardous or dangerous.

The case of *Hendrickson v. L. & N. R. R. Co.*, 137 Ky., 562, so confidently relied on by the appellee, is plainly distinguishable from this case. There the conductor of a freight train, knowing of the infancy, permitted the infant to use, or undertake to use, the brakes of the train, an occupation denounced by the court in that case as "intrinsicly hazardous." A recovery in that case was authorized on that ground alone.

It is neither intrinsically hazardous nor obviously dangerous for a youth fourteen years of age to assist in unloading light freight from a freight car and placing it on a depot platform; nor is it necessarily hazardous or dangerous for such youth to ride on the caboose of a freight train or to be permitted to do so.

We are of opinion that under the state of the record the motion for a peremptory instruction should have prevailed.

But, under the testimony of the boy, he was in fact a passenger on the freight train; his evidence is that the conductor agreed to take him to his home-station in consideration of his assistance in loading and unloading freight. *Chicago, St. Louis and New Orleans R. R. Co. v. Benedict's Admr.*, 154 Ky., 675.

Upon the return of the case the plaintiff will be permitted to amend his pleadings if he so desires.

The judgment is reversed with directions to grant appellant a new trial, and for further proceedings consistent herewith.

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### **Riddle, et al. v. Runnions, et al.**

(Decided February 12, 1915.)

#### **Appeal from Pike Circuit Court.**

1. **Land—Action to Recover—Evidence.**—Plaintiff sought to recover from defendants certain lands, claiming title through her father by deeds conveying to her all the land which the grantor owned in that vicinity, and which he had not theretofore conveyed. Defendants claimed title through a prior deed from plaintiff's father including "all the land in said boundary belonging to the party of the first part." Held, under the evidence, that the deed to defendants embraced the land subsequently conveyed to plaintiff, and that plaintiff's father had no title to the land at the time he conveyed it to her; and that the chancellor properly found for the defendants.
2. **Deeds—Evidence of Mistake—Admissibility.**—Evidence of a mistake in a deed is only competent in a direct action brought for the purpose of reforming the deed within the statutory time.

ROSCOE VANOVER for appellants.

J. S. CLINE for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

On July 8, 1850, Reuben Rutherford obtained a patent to 50 acres of land lying on Cow Branch of Pond Creek in Pike County. On the same day William May obtained a patent for 50 acres of land adjoining the former patent. In the year 1869 John Redford (Rutherford) obtained a patent for 15 acres of land adjoining Reuben Rutherford and William May patents. In the year 1866 Reuben Rutherford conveyed to his son John the land covered by the Reuben Rutherford and William May patents. In the year 1904 John Rutherford conveyed to his grandson, Landon Rutherford, a tract of land lying on the Cow Branch of Pond Creek, containing 100 acres, more or less. After giving various lines, the description in the deed concludes as follows:

"Thence with said John Rutherford's back lines a chestnut oak on top of the ridge, thence down the point with the center thereof, to a beech, thence a straight line to the beginning, so as to include all the land in said boundary belonging to the party of the first part."

On January 4, 1913, Landon Rutherford conveyed all the land which he acquired from his grandfather, John Rutherford, to Dixie Blackburn. On January 20th Dixie Blackburn conveyed to Fanny J. Runnions that part of the land acquired from Landon Rutherford lying on the Meadow Branch, a tributary of Pond Creek, and adjoining Fanny J. Runnions' home place. On May 12, 1913, Dixie Blackburn and husband conveyed to Mont Smith a certain tract of land lying on Peg's Branch of Pond Creek, and adjoining the land of Dixie Blackburn at the top of the hill at the head of Cow Branch Fork of Pond Creek. The tract conveyed to Fanny J. Runnions consists of two small tracts, one of two and eight-tenths acres, and the other of seven and three-tenths acres. The tract conveyed to Mont Smith consists of nine and six-tenths acres.

By deeds dated July 8, 1908, and October 18, 1912, Parlee Riddle, a daughter of John Rutherford, acquired title to all the land which her father owned in that vicinity, and which he had not theretofore conveyed.

Plaintiff, Parlee Riddle, brought this suit against Fanny J. Runnions to recover the two small tracts of land aggregating ten and one-tenth acres, and adjoining her home place, and against Mont Smith to recover the

tract on Peg's Branch, consisting of nine and six-tenths acres. The two suits were consolidated, and judgment entered in favor of defendants. Plaintiff appeals.

While the defendants resisted a recovery on several grounds, we deem it necessary to consider but one. In acquiring title to the lands in question plaintiff proceeded on the theory that these lands were not covered by the deed which her father had made to his grandson, Landon Rutherford. Of course, if the lands are included in that deed, then John Rutherford had parted with his title, and plaintiff acquired no title by virtue of the deeds which she subsequently obtained. John Rutherford testified that if the deed covered the land in controversy, it was a mistake. Manifestly this evidence was incompetent. Evidence of a mistake in a deed would not have been competent except in a direct action brought for the purpose of reforming the deed within the statutory time. Several witnesses testified that, taking into consideration the natural objects called for in the description, the description covered the tracts of land in controversy. In view of this testimony, and of the further fact that the description calls to run with the back lines of Rutherford, and concludes "so as to include all the land in said boundary belonging to the party of the first part," it is reasonably certain, we think, that the deed was intended to cover, and does cover, all the land which the grantor owned in that boundary. That being true, it follows that John Rutherford had no title to the tract in question when he attempted to convey to plaintiff, and that the judgment rendered by the chancellor was proper.

Judgment affirmed.

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### City of Newport, et al. v. Lang.

(Decided February 12, 1915.)

#### Appeal from Campbell Circuit Court.

Municipal Corporations—Cities of Second Class—Construction of Sewer—Tax—Ordinance Declaring Improvement a Necessity—Acts, 1910, c. 53.—While it is not necessary, under Chapter 53 of the Acts of 1910, for a city of the second class to pass an ordinance or resolution fixing and determining in advance the amount of tax to be levied upon the lots benefited by the pro-

posed construction of a sewer, yet it is necessary that a preliminary resolution or ordinance, declaring the construction of the proposed sewer to be a necessity, and setting out in general terms the property subject to the payment of the cost of the same, shall be passed before any ordinance for the construction of the sewer shall be passed.

OTOTO WOLFF for appellant.

MATT HERALD for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiff, Frank X. Lang, brought this action against the city of Newport to enjoin it from entering into a contract for the construction of a sewer. The city's demurrer to the petition was overruled and the injunction granted. On appeal to this court the judgment was reversed. *City of Newport v. Lang*, 155 Ky., 776. On a return of the case plaintiff amended his petition. The city again interposed a demurrer, which was overruled. From a judgment enjoining the execution of the contract the city again appeals.

By Section 3105 of the Kentucky Statutes, as amended by an Act approved March 22, 1910, Acts 1910, c. 53, p. 181, the general council of cities of the second class is given the power to construct sewers. The section contains the following provision:

"In every case the general council shall, by ordinance or resolution, fix and determine what lots and lands are benefited thereby, and fix and determine the amount of tax to be levied upon the several lots or lands so benefited. \* \* \* No ordinance for the construction of a sewer at the cost of the abutting or benefited property-owners shall be passed until a resolution declaring such construction a necessity and setting out in general terms the property subject to the payment of the cost of same, shall have passed by a two-thirds vote of the members-elect of each board of general council, and its determination as to the necessity of any such sewer shall be final."

The city of Newport has adopted the commission form of government, and the powers granted the general council are now exercised by the board of commissioners. The various proceedings leading up to the execution of the contract for the sewer were passed by that board.

While plaintiff, in his original petition, alleged that no ordinance was passed determining what lots and lands were benefited by the proposed sewer, he did not allege that no resolution was passed, nor did he set out the various steps taken by the commissioners. In view of this fact, his petition was held insufficient. On the return of the case, all the ordinances and resolutions in reference to the proposed sewer were set out. In addition to this fact plaintiff alleged that no ordinance or resolution fixing and determining what lots and lands were benefited by the proposed sewer, and fixing and determining the amount of tax to be levied upon the several lots so benefited, was passed by the board of commissioners. While it is doubtless true that it is not necessary to pass an ordinance or resolution fixing and determining in advance the amount of tax to be levied upon the lots benefited, but this can be done after the work has been completed and the amount of the tax to be levied upon the benefited lands may be accurately ascertained; yet it is necessary that a preliminary resolution or ordinance declaring the construction of the proposed sewer to be a necessity, and setting out in general terms the property subject to the payment of the cost of the same, shall be passed before any ordinance for the construction of the sewer shall be passed. All the steps taken by the commissioners are now before us, and it does not appear that any resolution or ordinance declaring the construction of the proposed sewer to be a necessity, and setting out in general terms the property subject to the payment of the cost of the same, was ever passed. It follows that the city's demurrer to the petition as amended was properly overruled, and that the judgment enjoining the execution of the contract was proper.

Judgment affirmed.

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### **Quigley's Trustee v. Quigley, et al.**

(Decided February 12, 1915.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, No. 2).

ARTHUR M. RUTLEDGE for appellant.

PERCY N. BOOTH for appellees.



RESPONSE BY JUDGE SETTLE TO PETITION FOR REHEARING—Extending opinion in 161 Ky., 85, and overruling petition.

The appellees have filed a petition for rehearing in this case, in which we are asked, if the rehearing be not granted, to modify or extend the opinion in respect to its statement as to the disposition to be made after the death of Laura Bell Quigley and Harriet Eliza Quigley of the estate devised them by the will of their father, Thomas Quigley, it being complained that the opinion apparently conveys the meaning that the devisees named are without power to dispose of the property by will if they die without children. That part of the opinion objected to is found in the following sentence:

“If the devisee dies without children it (the property devised) passes from the devisee *by descent*, as held in that case (the Eva Quigley case).”

It is needless to say what meaning might be given the above excerpt from the opinion standing alone. Considered, however, with other parts of the opinion, we do not think it susceptible of the meaning suggested by appellees' counsel. At any rate, it was not intended to be so understood. The meaning of the expression referred to, and of the opinion as a whole, is, that the appellees, Laura Bell Quigley and Harriet Eliza Quigley, have under the will of their father, Thomas Quigley, a defeasible fee in the property devised them by the fourth clause thereof, but that the defeasance can only result from the birth of a child or children surviving them; therefore, “if the devisee dies without children, it (the property devised) passes by descent,” provided the devisee does not dispose of it by will, which she may do. In other words, the intestacy of the devisee, dying childless, would enable the property to pass by descent.

Conceiving that this extension of the opinion will relieve it of the ambiguity complained of, and no sufficient reason being shown for the rehearing asked by appellees, the petition therefor is overruled.

**Allen v. Shepherd, et al.**

(Decided February 16, 1915.)

**Appeal from Magoffin Circuit Court.**

1. **Mortgages—Purpose May Be Shown—Indemnity.**—A mortgage, in the usual form, purporting to secure the payment of a sum certain, may be shown to have been given only for the purpose of indemnifying the mortgagee against loss.
2. **Mortgages—Definition of Mortgage.**—A mortgage is a security incident to the legal obligation to pay; and, whenever the obligation ceases, the security must cease with it, since there can be no security for a debt which has no legal existence.
3. **Mortgages—Security for Debt.**—A mortgage may be so drawn as to contain an independent agreement, which absorbs the original contract; but, in the usual form, a mortgage is simply a collateral undertaking, and is a mere security for the debt.
4. **Mortgages—Limitation of Action—Contracts.**—If an action could be brought and recovery had upon a mortgage as a substantive agreement, the statute of limitations applicable to written contracts applies; but if it could not be so declared upon and a recovery had, it comes within the five years' statute applicable to "contracts not in writing," and the right of recovery is barred after five years.

**ARNETT & HOWARD** for appellant.**BYRD & HOWARD** and **E. W. PENDLETON** for appellees.

**OPINION OF THE COURT BY CHIEF JUSTICE MILLER—**  
**Affirming.**

On September 14th, 1911, the appellant, J. N. Allen, filed this action against the appellees, who are the administratrix and children of Jeff Shepherd, deceased, to recover a balance of \$75.00 claimed to be due on a mortgage to Allen for \$100.00, executed by Jeff Shepherd and wife on 200 acres of land on Licking River, in Magoffin county. The mortgage was executed on December 17th, 1900. Jeff Shepherd died in 1908, and his wife Bettie qualified as his administratrix.

The answer traversed the petition, and alleged affirmatively that on September 6th, 1900, Jeff Shepherd had sold a one-eleventh interest in another tract of land which he had inherited from his father, John E. Shepherd, to Allen for \$150.00, one-half of said purchase price being paid in cash, and the remaining \$75.00 to be paid in ninety days thereafter.

The answer further stated that afterwards, on December 17th, 1900, Allen having complained to Shepherd that the land Jeff Shepherd had sold him was in danger of being subjected to the payment of John E. Shepherd's debts, Jeff Shepherd and wife executed the mortgage of December 17th, 1900, and sued on herein, to indemnify Allen against any loss from that source. The answer further alleged that no part of the land sold to Allen had ever been subjected to the payment of John E. Shepherd's debts; that Allen's possession had never been disturbed; and that appellees, therefore, owed him nothing.

By way of counter-claim, Jeff Shepherd's administratrix prayed judgment for the \$75.00 unpaid purchase money, with interest from September 6th, 1900, the date of the conveyance.

In his reply Allen alleged that his lien note of September 6, 1900, for \$75.00 purchase money above referred to was payable when the estate of John E. Shepherd, deceased, should be settled by a judgment of court, and only in the event said estate should be indebted to Jeff Shepherd's administratrix. The reply further alleged that the \$75.00 note of September 6th, 1900, was paid at the time the mortgage of indemnity was given to Allen on December 17th, 1900, and in consideration for said payment, and to protect Allen's land against liability for John E. Shepherd's debts; and, further, that Allen had been made a defendant in the suit to settle John E. Shepherd's estate; and that he had been required to pay, under a judgment in that case, \$75.00 upon the debts of John E. Shepherd.

The rejoinder traversed all the affirmative allegations of the reply.

By an amended answer, appellees interposed the five year statute of limitations and the ten year statute of limitations, in bar of Allen's right to recover any money he had been required to pay upon the indebtedness of John E. Shepherd, deceased.

The chancellor sustained the plea of limitation, dismissed the petition, and Allen appeals.

Waiving the question of irregularity of the pleadings in setting up plaintiff's cause of action in the reply rather than in the petition, and coming to the merits of the case, the three issues presented for decision are:

(1) Did Allen pay his lien note for \$75.00, dated September 6th, 1900; (2) did Allen pay \$75.00, or any sum, upon the debts of John E. Shepherd, deceased; and (3) if he did pay said sum, or any sum, towards John E. Shepherd's indebtedness, is his right to recover it now barred by limitation?

1. The first issue is concluded in Allen's favor by the receipt of Jeff Shepherd, dated December 17th, 1900, the day the mortgage sued on was given, in which it is recited that he had received of Joseph N. Allen \$75.00 in full satisfaction of his note for purchase money for the land above described. Shepherd's signature is attested by J. T. Wireman, and the genuineness of the receipt is in no way questioned. This receipt fully corroborates Allen's contention that the indemnity mortgage was given at the time he paid his lien note, and to secure him against liability for John E. Shepherd's debts.

2. Although the petition does not state that the mortgage sued on was given only for the purpose of indemnifying Allen, it is so stated in the answer, conceded in the reply, and sustained by the proof.

But the mortgage sued upon contains no words of promise upon the part of Jeff Shepherd, the mortgagor, and does not pretend to secure the payment of any note. The proof shows, beyond a doubt, that the mortgage sued on was given to indemnify Allen against any liability for the debts of John E. Shepherd, deceased.

The record in the suit to settle the estate of John E. Shepherd has been lost beyond recovery; but the fact that Allen was a defendant to that action, and that a judgment was taken against him for an ascertained sum, was fully shown by parol evidence. Patrick, the attorney for Hale, the administrator of John E. Shepherd, testified that Allen had paid him sums upon two separate occasions, and that he gave him receipts therefor, which would show the amounts so paid. Allen has filed two receipts from Patrick, given in 1903, one for \$15.00, and the other for \$20.00; and, in the absence of other evidence, the amount of Allen's payments upon John E. Shepherd's debts must be measured by these two receipts.

3. Upon the question of limitation, it is well settled in Kentucky that where the debt is barred by limitation no recovery can be had upon a mortgage to secure the indebtedness, the mortgage being merely ancil-

lary to the debt. If an action cannot be maintained on the note, the lien, which is only a security, cannot be enforced. *Vandiver v. Hodge*, 4 Bush, 539.

In *Yeates v. Weeden*, 6 Bush, 438, the court said:

“The security is an incident that follows the legal obligation to pay, and whenever that obligation ceases, the security, from the very nature of the case, must cease with it; for there can be no security for a debt which has no legal existence.”

Neither can a suit be maintained upon the mortgage in this case, for the reason that it contains no words of promise which would bring it within the definition of a written contract or obligation upon the part of Jeff Shepherd to pay the money therein referred to, which would be barred only after the lapse of fifteen years from its maturity. Where a mortgage contains no independent agreement to pay the money secured, it is barred after five years.

The rule in cases of this character was definitely stated in *Prewitt v. Wortham*, 79 Ky., 287, where the court said:

“The mortgage recites that it is made to secure an indebtedness of \$200.00, without specifying how the indebtedness arose or how it is evidenced, and concludes: ‘The above obligation is such that if the said Prewitt shall well and truly pay the above-named \$200.00, then this obligation is to be void.’

“The test of whether this is a ‘written contract’ within the fifteen years’ statute of limitations depends upon whether it could be declared on as a covenant to pay. If an action could be brought and recovery had upon the mortgage as a substantive agreement, the statute as to written contracts applies; but if it cannot be so declared upon and a recovery had, it comes within the five years’ statute of ‘contracts not in writing,’ and the right of recovery is barred. The element wanting here is of a substantive promise to pay. Even in a petition upon a note there must be an allegation of a promise notwithstanding the note declared upon contains an undertaking to pay.

“A mortgage may be so drawn as to contain an independent agreement, which absorbs the original contract, but in the usual form a mortgage is simply a collateral undertaking and is a mere security for the debt.

The rule in this State in reference to mortgages, whether on personal or real estate, is, that they are mere securities for the debt. No title passes to the mortgagee, and no right is acquired by the mortgagee, except as an incident to the debt. When the debt to secure which the mortgage was given is barred by statute, the incident goes with the principal, and the mortgage ceases to be enforceable."

See also *First National Bank v. Thomas*, 8 Ky. L. R., 690, 2 S. W., 776; *Worsham v. Lancaster*, 20 Ky. L. R., 701, 47 S. W., 448; *McCormick v. Perry*, 29 Ky. L. R., 420, 93 S. W., 607; *Russell v. Centers*, 153 Ky., 469, to the same effect.

The mortgage sued on, therefore, was not a written contract to pay the debt and did not create any liability upon the part of Jeff Shepherd to pay it. Allen's right to recover the \$35.00 which he had paid upon the indebtedness of John E. Shepherd, deceased, being created by statute, was barred after the expiration of five years from 1903, while this action was not instituted until 1911.

It follows that the circuit court properly sustained the plea of limitation, and the judgment must be affirmed. It is so ordered.

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### Schirmer, et al. v. Myers, et al.

(Decided February 16, 1915.)

#### Appeal from Carroll Circuit Court.

1. **Contracts—Sale and Delivery of Tobacco.**—In a contract for sale and delivery of tobacco, after it was stripped, where the place of delivery was changed by subsequent agreement from Madison, Ind., to Carrollton, Ky., the fact that the purchaser later told them not to deliver it at Carrollton, did not justify the seller in secretly delivering to Carrollton and selling to other parties.
2. **Contracts—Delivery of Tobacco.**—It was their duty to deliver at Carrollton, and offer it to the purchaser in a reasonable time after stripping.
3. **Contracts—Sale and Delivery of Tobacco.**—The purchaser did not abandon the contract or release the seller by asking for another change in the place of delivery, and if the seller failed to deliver according to contract, he is liable in damages to the purchaser.

WINSLOW & HOWE for appellants.

SMITH & GREENE and T. B. MCGREGOR for appellees.

## OPINION OF THE COURT BY JUDGE NUNN—Reversing.

This is a suit by Schirmer & Company to recover damages of Myers and Brinley for breach of contract in the sale of tobacco. In the lower court judgment went for Brinley and Myers, and Schirmer appeals. Brinley was a tenant of Myers, and, in the year 1912, raised a tobacco crop of about 4,000 pounds on Myers' farm. As tenant, Brinley owned one-half of the tobacco, and Myers the other half. On November 8th, 1912, they signed a contract selling to Schirmer the whole crop at \$14.50 per hundred pounds, and agreed to deliver it at the warehouse of Schirmer & Company, in Madison, Indiana. The contract is silent as to time of delivery and payment. Brinley says it was understood that they were to make delivery of the tobacco when it was stripped.

During February, 1912, and without notice to Schirmer, Brinley and Myers delivered one lot of the tobacco at a warehouse in Carrollton, Kentucky, and which was sold on their account, but not in their own name, and the balance of it was sold at or about the same time from their barn. In neither case did appellees tender the tobacco to Schirmer, nor did he have any knowledge of the delivery or sale. One lot brought \$21 per hundred, and one lot \$16 per hundred. There is no controversy about the fact that at the time the tobacco was sold in February it was worth on the market \$235.30 more than would have been realized by Myers and Brinley under the price at which they contracted to sell to Schirmer. Brinley and Myers admit the contract of sale, but justify their breach of it by claiming Schirmer first broke it. Brinley testifies that about a month or six weeks after the contract Schirmer told them not to deliver at Madison, and about two weeks later he told him not to deliver at Carrollton. Schirmer says that Brinley did ask for the privilege of delivering at Carrollton instead of Madison, and he consented to the change by way of accommodation to them.

Brinley explains that two weeks after the last conversation there was a flood stage in the Ohio, and back-water was within six inches of the floor of his barn—that under the circumstances it was hazardous to carry the tobacco across the river to Madison, and he had to move it to Carrollton.

The court instructed the jury to find for Schirmer & Company under a proper measure of damages, unless

they believed from the evidence that, after Schirmer bought the tobacco, he agreed with Brinley and Myers that the delivery should be made at Carrollton, Kentucky, instead of Madison, Indiana, and that Brinley and Myers were in good faith making arrangements to deliver to Schirmer the tobacco at Carrollton when Schirmer notified them that he would not receive it at Carrollton, and directed them to deliver it at Madison, Indiana, instead.

We are of the opinion that this instruction was erroneous, and that the court should have peremptorily instructed the jury to find for Schirmer & Company under a proper measure of damages. There is absolutely no evidence that Schirmer abandoned the contract or did anything that would operate as a release to appellees. The most that he ever did was to consent to a change in the place of delivery, and it is evident that this was done at the instance of appellees and for their accommodation. He never told them that he would not receive the tobacco. The delivery under the contract required a twelve mile haul to Madison. Schirmer consented that they might deliver to Carrollton instead, and that involved a haul of one and one-fourth miles only. It is true appellees say that subsequently Schirmer directed them not to deliver it at Carrollton. This was not an abandonment of the contract. Accepting as true the statements of appellee, Schirmer had a right to ask them to again change the place of delivery, and, if they would not agree to that, then it was their duty, within a reasonable time, and as soon as the tobacco was stripped, to deliver it at Carrollton, and notify Schirmer. They took the tobacco to Carrollton, but it was done secretly and without notice to Schirmer. Had they notified him, or offered it to him there and he refused to take it, they would be at liberty to sell it to other parties, and if it brought less than the contract price, Schirmer would have been liable to them in damages for the difference.

Appellees argue that shortly after the contract was entered into there was a substantial decline in the market price of tobacco, and for that reason Schirmer & Company did not want to take it, but the record does not contain any evidence of a decline in the market. On the contrary, there was a substantial increase in the market, and that fact, in connection with the shorter haul to Carrollton, explains, as argued by appellants, why Brinley



and Myers hauled some of the tobacco to Carrollton without the knowledge of Schirmer and had it sold under another name, and why the remainder was privately sold about the same time from their barn. There is no evidence that appellees were making any arrangement to deliver the tobacco to Schirmer at Carrollton, or elsewhere. As above indicated, appellees were not justified in selling the tobacco to other parties, unless Schirmer refused to receive it or notified them that he would not take it if delivered.

The judgment is, therefore, reversed for further proceedings consistent with this opinion.

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### **Lewis v. Creech's Administrator.**

(Decided February 16, 1915.)

#### **Appeal from Laurel Circuit Court.**

**Contracts—Contract for Support of Child—Uncertainty.**—A contract between the putative father and the mother of a child that the father would support, maintain and educate the child and that before he died he would make such provisions out of his estate as would make the child equal with his other children, is not void for uncertainty.

**HAZLEWOOD & JOHNSON** for appellant.

**D. K. RAWLINGS** and **RAWLINGS & WRIGHT** for appellee.

#### **OPINION OF THE COURT BY JUDGE NUNN—Reversing.**

This action is to recover damages for breach of contract. It went off on demurrer in the court below, and the plaintiff appeals. Taking as true the facts stated, as we must on demurrer, the appellant is the illegitimate daughter of Eliza Pace, and J. G. Creech was the father. At the time this suit was filed, in 1913, appellant was 40 years of age. She alleges that before she was three years old her mother contemplated instituting bastardy proceedings in the county court against J. G. Creech, as the natural father of her child, and notified Creech of her purpose. Creech owned considerable property, and had high social standing and political ambition. Being anxious to avert the consequences of such proceedings and in order to induce the mother to forbear, he thereupon

entered into a verbal contract with her, promising and agreeing, in effect, if she would not institute bastardy proceedings, he would assist her in rearing, maintaining and educating the child, "and that he would as long as he lived see that plaintiff had a competency, and that before he died he would make such provisions out of his estate as would make this plaintiff absolutely equal with his other children and an heir of his estate and financially independent for all future time."

Creech, in pursuance of that contract, did assist the mother in rearing, maintaining and educating the child, and after she reached maturity continued to help her by furnishing money and clothing. A short time before the action was instituted Creech died intestate, and without having made any provision for her "of either money or property so as to make her an equal heir of his estate, or such part thereof as his other children, or financially independent in life or set aside or provide any sum whatever for her in the future."

It is alleged that at the time of his death Creech was possessed of an estate worth at least \$25,000, and left surviving him five children. She asks for damages against his estate for the sum of \$10,000.

It is conceded that there is sufficient consideration to uphold the contract, and that it is not affected by the statute of frauds. But the administrator insists that the unperformed part of the contract, the part quoted, is too indefinite and uncertain for enforcement, and, therefore, no damages can be recovered for its breach. Furthermore, it is urged that a contract to make one an heir, or rather a contract to adopt a child, is against public policy, and, therefore, void. There does not seem to be much difference of opinion between the parties in construing the contract, or in their methods of construction. Both agree that the intent of the parties should govern, and that it is evident from the contract that the plain intent of John Creech was, at some time before his death, by gift, will, or adoption, to put appellant on the same footing with his other children as to property.

Appellee argues that this intent, as expressed in the agreement, is too indefinite and uncertain, because it is impossible to fix or ascertain the amount which Creech intended and agreed to pay over or set apart for her benefit, since Creech at the time had no idea how many children he would have, or who would be ca-

pable of inheriting. We find ourselves unable to accept this reasoning. As he left surviving him five legitimate children, there is no uncertainty now as to what part of his estate each of the five is entitled to. There can be no less certainty about how much each will be entitled to if his estate is equally divided between six children. It is true, at the time the contract was made, the parties did not determine just how much of his estate, that is, the proportion this natural child would take, nor how much of his estate he would set apart for her if he made the provision by gift before his death, but the contract provides a basis for determining the portion—he would make her “equal with his other children.” The number of children he had at the time when he would make the gift or will would control or else the number he left surviving would fix the measure of damages. Of course, how much estate he would accumulate or leave for distribution was uncertain at that time, but there is no uncertainty about it now. Uncertainty as to amount could have been urged as well to a contract agreeing to set over or devise his whole estate. *Mercer v. Mercer*, 9 Ky. L. R., 884, was a suit in assumpsit by illegitimate children to recover of the estate of their putative father, and under a contract made “in consideration of his relationship and the natural and moral duty resting upon him to support and educate them, promised to give and secure to them thereafter his entire estate, less \$10,000, to be given to another illegitimate child.” It did not appear that any bastardy proceedings were contemplated or that there was any agreement to forbear. The only consideration alleged was moral duty of the putative father to support and educate the children. While the court held that this consideration was insufficient, yet there was no criticism of the contract for uncertainty. Had there been sufficient consideration, the contract, as indicated in the opinion, would have been upheld upon proper proof of its making.

That part of the contract where Creech undertook to make the plaintiff “financially independent for all future time,” is, of course, indefinite, but that would not render the remainder of the contract unenforceable if definite. In fact, we regard his promise to make her an heir of his estate and financially independent as matter of description, and tends to show the inducement he offered the mother to secure her forbearance; that is,

he told her, and incorporated it into the contract, that when he provided for the child equally with his other children, she would be the same as his heir, and would be financially independent.

The case of *Benge v. Hiatt*, 82 Ky., 666, was based upon a contract made by the mother of an illegitimate child and its putative father. In consideration that the mother would and did surrender the custody of the child to the father, he promised to rear and educate it, and, in addition thereto, would give the child \$1,000 in money and the tract of land on which the father then lived of the value of \$2,700. The consideration was deemed sufficient, and, although the contract was oral, and, therefore, the promise to convey land was not enforceable, yet the court held that the child was entitled to recover its equivalent in value, not as the measure of damage for the failure to convey the land, but as constituting in part the standard of value agreed on by the father for the forbearance and relinquishment or surrender of the child by the mother. We are unable to see that the value of a one-sixth part of Creech's estate is any more uncertain or difficult of ascertainment than the value of the land in the *Hiatt* case.

Turning now to appellee's contention that this is an agreement to make one an heir-at-law, and is, therefore, unenforceable and void, we are cited to the case of *Davis v. Jones' Admr.*, 94 Ky., 320. In that case George Jones agreed with the mother of the infant that if she would surrender to him the custody, care and control of a child—not his own—that he would clothe, support and educate her, "and make her his heir-at-law, so that she could inherit all of his estate." Jones died in a short time without adopting her, and damages were claimed for breach of the contract. This court affirmed the ruling of the lower court in sustaining a demurrer to the petition. Such agreements were held to be against the policy of the common law, because "heirship is controlled by the law of descent, having for its basis the degree in blood, etc., and such agreements as that sued on in this case would put the estate in a different channel than that fixed by the law of descent."

Quoting again:

"But the Legislature of this State has seen proper to authorize certain parties to make persons not related to them their legal heirs upon certain conditions by

petition to the county court having jurisdiction, and it has been settled by this court that the authority thus given is the only authority existing in this State by which one person can make another his legal heir."

But Jones was not the father of the child in question, nor was he related to it. Aside from the contract he was under no moral or other obligation. The child was a stranger in blood, and, as the court said, the Legislature has seen proper to provide a means whereby one may make a person not related to him his legal heir. The Legislature has also seen fit to provide a means for imposing upon a natural father the expense of maintaining his illegitimate child.

But the case at bar is not a suit for adoption, nor to have a judgment declaring the plaintiff a legal heir of Creech. There is no attempt to have the cloud removed from her paternity. It is a prayer for damages for his failure to make such provision out of his estate as would equalize her with the other children who were his heirs, and the claim for damage grows out of the contract whereby the mother of the child agreed not to adopt the statutory method of imposing upon him the expense of the child's maintenance. In other words, she accepted his verbal promise in lieu of the statutory remedy.

We have reached the conclusion that the facts stated in the petition are sufficient to support a cause of action for damages. If the contract be sustained by the evidence, the measure of damage is a sum sufficient to make her equal with the other heirs of John Creech.

The judgment of the lower court is, therefore, reversed for further proceedings consistent with this opinion.

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### Day v. Commonwealth.

(Decided February 16, 1915.)

Appeal from Lawrence Circuit Court.

1. **Criminal Law—Indeterminate Sentence—Instructions.**—An instruction on the subject of voluntary manslaughter telling the jury that if they found the defendant guilty they should "fix his punishment at confinement in the penitentiary at any time so that it be not less than two years and not to exceed twenty-one years

in the discretion of the jury," was prejudicially erroneous under the indeterminate sentence act.

2. Criminal Law—Indeterminate Sentence—Verdict—Judgment.—Under the indeterminate sentence law the verdict of the jury must fix a minimum and a maximum sentence and the judgment must conform to the verdict.

FINLEY E. FOGG, FRED M. VINSON, H. C. SULLIVAN, W. D. O'NEAL, W. T. CAIN and GARRED & GARRED for appellant.

JAMES GARNETT, Attorney General, and JOHN M. WAUGH for appellee.

#### OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

On the trial of the appellant under an indictment charging him with murder the court, in instruction number two, on the subject of voluntary manslaughter, told the jury that if they found the defendant guilty under that instruction they should "fix his punishment by confinement in the penitentiary at any time so that it be not less than two years and not to exceed twenty-one years, in the discretion of the jury." The jury found the defendant guilty under this instruction, and in their verdict said: "We, the jury, agree, and find the defendant, Nathan C. Day, guilty under instruction number two, and fix his punishment at the period of twenty-one years in the State penitentiary."

On this verdict the court sentenced the defendant to confinement in the penitentiary at Frankfort for the period of twenty-one years.

The grounds of reversal relied on are that the court failed to give the proper instruction on the subject of voluntary manslaughter, and that the verdict and judgment thereon do not conform to the indeterminate sentence law.

In *Biggs v. Com.*, 162 Ky., 103, we had under consideration the question here involved, and held that an instruction similar to the one given in this case was prejudicial error. In addition to this, the verdict of the jury, as well as the judgment thereon, disregarded the plain letter of the indeterminate sentence act, now Section 1136 of the Kentucky Statutes. This act provides that "if the jury find the defendant guilty, they shall fix and render against the defendant an indeterminate sentence or judgment of imprisonment in the penitentiary for an indefinite term, stating in such verdict the maximum and minimum limits thereof. \* \* \* and there-

upon the court shall render a judgment in conformity with such verdict." It will be observed that the verdict did not fix an indeterminate sentence or any minimum sentence at all, and that the court, in entering the judgment, simply followed the verdict.

For the reasons stated, we are reluctantly compelled to reverse the judgment and remand the case for a new trial, and it is so ordered.

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### **Bishop's Administrator v. Bishop, et al.**

(Decided February 16, 1915.)

#### **Appeal from Lincoln Circuit Court.**

**Judgment—Merger and Bar of Causes of Action and Defenses—Matter Available in Former Action as Set-off and Not Plead.—**Where defendant has an independent claim against plaintiff, such as might be either the basis of a separate action, or might be pleaded as a set-off, he is not obliged to plead it in plaintiff's action although he is at liberty to do so; and if he omits to set it up in that action, under Section 17, Civil Code, he may thereafter sue plaintiff on the claim; and having that right, he has likewise the right to interpose the claim by way of set-off when plaintiff's foreign judgment is sought to be enforced.

J. N. SAUNDERS for appellant.

J. B. PAXTON for appellees.

#### **OPINION OF THE COURT BY JUDGE HANNAH—Affirming.**

On March 19, 1904, Josiah Bishop was, by the Probate Court of Kay County, Oklahoma, appointed administrator of the estate of his deceased son, Fred P. Bishop, who died a resident of said county.

On January 3, 1906, the letters of administration were revoked, and E. L. Faris was appointed administrator instead of said Josiah Bishop.

On April 29, 1908, upon a final statement of the accounts of Bishop as administrator, he was ordered to pay into the hands of his successor \$1,134.50; and Faris was ordered to bring suit therefor if not paid within fifteen days.

On March 16, 1909, Faris, administrator, instituted this action in the Lincoln Circuit Court, this State, against Bishop to recover the sum mentioned.

Bishop answered and interposed by way of set-off the fact that on July 10, 1904, he was compelled to and did pay a note in the sum of \$1,195 upon which he was surety for Fred P. Bishop, his deceased son. The court dismissed the petition, and plaintiff appeals.

1. Appellant contends that the order of the Probate Court of Kay County, Oklahoma, directing Bishop, as administrator removed, to pay into the hands of his successor \$1,134.50 was a judgment; and that as Bishop failed to claim credit in that settlement for the amount paid by him as surety for his son prior thereto, he can not in this action interpose it by way of set-off, being concluded by the former alleged judgment.

Appellee contends that the order mentioned was not a judgment. We find it unnecessary, however, to decide the question; for, conceding that it is a judgment, Bishop still had a right to interpose his set-off.

In 23 Cyc., 1202, it is said that: "As a general rule, where a defendant has an independent claim against plaintiff, such as might be either the basis of a separate action or might be pleaded as a set-off or counter-claim, he is not obliged to plead it in plaintiff's action, although he is at liberty to do so; and if he omits to set it up in that action, this will not preclude him from afterward suing plaintiff upon it." And, of course, if he may sue plaintiff upon it, he may, in the same right, interpose it as a set-off when the foreign judgment is sought to be enforced.

In *Truesdale v. Brady*, 105 S. W., 122, 31 R., 1336, plaintiff sued for damages for breach of contract; defendant failed to plead as a counter-claim a balance due to him from plaintiff on the contract; and the court held that a judgment for plaintiff was not a bar to a subsequent action by defendant against plaintiff to recover the balance due him on the contract, as under Section 17, Civil Code of Practice, the former judgment did not prevent a recovery on any claim "which was not, though it might have been, used as a defense by way of set-off or counter-claim in the action." For other cases under this section of the Code see *City National Bank v. Gardner*, 5 R., 682; *Walker v. Thomas*, 8 R., 700; *Sherley v. Trabue*, 85 Ky., 71; *Emmerson's Admr. v. Herriford*, 8 Bush, 229; *Commonwealth v. Barker*, 126 Ky., 210. See also *Jefferson Noyes & Co. v. Western National Bank*, 144 Ky., 62, wherein the distinction between what constitutes



a defense merely and what is really the basis of a separate action, is well considered.

In the case at bar the claim of Josiah Bishop against the estate of his deceased son, arising by virtue of the former's payment as surety for the latter of the note for \$1,195, was incontestably an independent matter such as rendered it optional with him whether he should claim credit for it in the Oklahoma Probate Court.

It is claimed by appellee in briefs of counsel that his Oklahoma attorney to whom the note was sent when paid, failed to file it and obtain proper credit for it in the settlement; but the record does not so show. However, it is immaterial as to how the failure occurred to claim credit for the payment of the note at that time. Appellee under the authorities above cited had the right to sue upon the claim in an independent action, and, having that right, he had likewise the right to interpose it as a set-off in the action on the foreign judgment.

Judgment affirmed.

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### Graham, et al. v. Edwards, et al.

(Decided February 16, 1915.)

#### Appeal from Green Circuit Court.

**WILLS—Requisites and Validity—Form and Contents of Instrument—When Signed "At the End."**—Kentucky Statutes 468 requires a will to be signed at the end or close thereof. Held a substantial compliance, where a will was written on a sheet of legal-cap paper, and there not being room at the bottom of the sheet for the testator's signature, he wrote his name on the ruled line which runs from the top to the bottom of the paper near the left margin, the name being written thereon beginning at the bottom. There was a small space above his name as written, that is, between his name and the extreme left margin of the sheet, but this was not so unreasonable a blank space as to render the signature insufficient.

NOGGLE & GRAHAM for appellants.

JEFF HENRY, BOYCE H. SKAGGS and W. H. JONES for appellees.

OPINION OF THE COURT BY JUDGE HANNAH—Reversing.

J. H. Graham died a resident of Green County in 1913. Soon after his death there was found by the appraisers of his estate among his effects a paper which, under the condition of this record, will have to be treated as a holographic will. The original writing is before us, and it stands admitted that the whole thereof is in the handwriting of the testator. It is written upon a single sheet of legal-cap paper, and on one side of the sheet. The testator began near the top of the sheet, and when he reached the end of the last line thereon, he had written the entire will with the exception of his signature. There being no remaining space at the bottom of the sheet where the lines for writing are ruled, the name appears signed on the vertical marginal line which on the sheet in question is a little over an inch from the left-hand margin of the paper. The signature begins at the bottom of the sheet and extends toward the top approximately one-half the length of the sheet. Because of the position of the signature, the county and circuit courts refused to admit the will to probate; and the only question involved upon this appeal is the sufficiency of this method and form of signature to the will.

The writing is somewhat crude in form, but it is complete in every detail; and to make it complete required all the available space on the horizontal lines on the right of the vertical marginal line. There is no space left on the last or lower horizontal line, the closing sentence consuming the whole of said line and making complete sense. Had there been sufficient space on the right-hand side of the sheet to have placed the signature there in a vertical position, and had the signature been so placed, there would have been little or no grounds for appellee's contention as to the insufficiency of the signature; but there was no space there.

Had the signature been written with the top of the letters thereof next to the vertical marginal line, instead of being written as it was, with the bottom of the letters of the signatures resting on the marginal line, there would have been less ground for appellee's contention than now exists. The space left above the signature, that is, between the left-hand margin of the sheet and the signature, is more troublesome.

Section 4828, Kentucky Statutes, requires that a will shall be subscribed by the testator; and Section 468 Kentucky Statutes, provides that when the law requires

a writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of such writing.

The primary purpose of these statutory provisions is, of course, the prevention of the interpolation of matter between the end or close of the writing and the signature thereto by unauthorized persons; and that purpose may be more easily fulfilled in the case of holographic writings than of non-holographic writings.

"In *Soward v. Soward*, 1 Duv., 126, it was held that under the statute the subscription (to a will) was insufficient if there was any unnecessary and unreasonable blank space between the conclusion of the will and the signature of the testator or the names of the witnesses." (*Ward v. Putnam*, 119 Ky., 889, 85 S. W., 179, 27 R., 367.)

In the case of the will here under consideration there is a small space between the extreme left-hand edge of the sheet and the signature of the testator resting upon the ruled marginal line, approximately equivalent to the space which would have intervened between the top of the sheet and the signature had the testator, instead of signing as he did, turned the sheet over and signed on the second line nearest that end of the sheet at which the writing on the other side of the sheet came to an end.

We have been able to find but one case where a will was signed identically as the one here under consideration. In *Collins' Goods*, Ir. L. R. 3 Eq., 241, the testator placed his signature transversely along the left-hand margin of the sheet of paper upon which the will was written, there not being room at the bottom of the sheet for his signature. The will was held valid as a substantial compliance with the Act of 15 Vict. Chap. 24, a statute somewhat similar to ours.

The will here under consideration being holographic, and being complete in form, the peculiar position of the signature strengthens rather than weakens the theory that nothing has been added; and we do not think the space intervening above the signature should be declared to be so unnecessary or unreasonable as to invalidate the instrument.

2. There still remains, however, the question whether the will was signed at the end thereof within the meaning of the statute.

As to what constitutes the end of a writing there is a dearth of authority in this State; but in the Estate of

Seaman, 146 Cal., 455, 80 Pac., 700, 106 A. S. R., 53, 2 Ann. Cas., 730, it was said:

"The requirement that the name shall be subscribed at the end of the will is not satisfied by having that name written at any place after the termination of the written matter irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute."

This seems to us to be a reasonable rule, and in the case of the will here involved we think the signature is sufficiently near to the concluding words of the instrument as to afford a reasonable inference that the testator intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. The face of the instrument shows that the signature was intended to be placed at the end of the testamentary provisions, and it is in such proximity to the end of the instrument as to constitute a substantial compliance with the requirement of the statute.

The judgment is, therefore, reversed.

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**Engelhard, et al. v. Kentucky & Indiana Construction Company, et al.**

(Decided February 16, 1915.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, Second Division).

**Municipal Corporations.—Street Improvements—Assessment for.**—The council had the power to adopt an ordinance providing for the improvement of Barney Avenue from Park Boundary Road to Alta Avenue, extending back a depth of 373 feet, the work to be done at the cost of the owners of the ground within the boundary, although a part of the boundary was outside of a line drawn

at right angles from the intersection of Barney Avenue with Park Boundary Road.

R. A. McDOWELL, for appellants.

FURLONG, WOODBURY & FURLONG for appellees.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The city council of Louisville adopted an ordinance providing that the "carriageway of Barney Avenue from the southeast line of Park Boundary Road to the northwest line of Alta Avenue should be 30 feet in width and should be improved by grading, curbing, and paving with asphalt pavement, and that said work should be done at the cost of the owners of the ground, as provided by law, on both sides of Barney Avenue from Park Boundary Road to Alta Avenue and extending back northeast and southwest, respectively, to a depth of 378 feet."

Barney Avenue, speaking generally, but not according to the exact points of the compass, runs east and west, intersecting on the east Alta Avenue and on the west Park Boundary Road, the distance between the points of intersection being about 282 feet. From the point of intersection Alta Avenue runs in a northerly direction almost at right angles with Barney Avenue, while Park Boundary Road runs in a northerly direction about 150 feet and then rather abruptly turns to the west, running in a northwesterly direction for several hundred feet.

The appellants, Engelhard, Lock and Mewborne own lots fronting on Park Boundary Road and within 378 feet from Barney Avenue. The lot of Mewborne, which is a hundred feet wide, is 150 feet north of Barney Avenue. Adjoining this lot on the north is the lot of Lock, which is also a hundred feet wide; and adjoining this lot on the north is the lot of Engelhard, also a hundred feet wide. The Board of Public Works, in making its apportionment for the cost of the improvement of Barney Avenue, took in the whole of these three lots, while counsel for the appellants insist that only so much of these three lots was subject to the improvement tax as lay within a line drawn at right angles from the point where Barney Avenue intersected Park Boundary Road. That no part of these lots between a line so drawn and Park Boundary Road could be subjected to the improvement tax. The result of this would be that about half of

each of these lots would escape the tax, because a line run at right angles in the manner indicated would leave outside of the tax boundary that part of each one of these lots fronting on Park Boundary Road and running back to the right angle line.

The lower court subjected the whole of all these lots to the tax on the theory that as all of them were within 378 feet of Barney Avenue and between Park Boundary Road and Alta Avenue, they were within the description of the ordinance and subject to the tax.

Section 2833 of the Kentucky Statutes provides, in part, that "when the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth, not exceeding 500 feet, on both sides of said improvement to be assessed for the cost of making the same." And it is the argument of counsel for the plaintiff that as the territory contiguous to Barney Avenue and subject to the improvement tax assessed against property on Barney Avenue was not defined into squares by principal streets, the council had no authority to enact an ordinance imposing an improvement tax on property which at any point covered by the improvement tax extended beyond the ends of the street for the benefit of which the improvement tax was imposed. Or, in other words, taking this case as an example, the council did not have authority to enact an ordinance taxing the property of these appellants outside of a line drawn at right angles from the points at which Barney Avenue intersected Alta Avenue and Park Boundary Road. It is further insisted that the ordinance here in question did not attempt to do more than this, but that the Board of Public Works erroneously construed the ordinance to embrace all the property between Alta Avenue and Park Boundary Road within 378 feet of Barney Avenue, although a good part of the property within this distance was outside of a line drawn at right angles as indicated.

In support of the proposition that property outside of a line drawn at right angles could not be assessed, attention is called to the case of *Button v. Kremer*, 114 Ky., 463; but an examination of that case shows that it has no pertinent bearing on this case. The court, after setting out the statute, said: "This case does not fall within either of the conditions recited in the statute. It

is admitted that the contiguous territory is not defined into squares, and it is apparent from the admitted facts that appellant's property does not front that part of Fourth Street, with the improvement of which they are sought to be charged in this proceeding. The statute has failed to provide for the exact conditions shown to exist in this case. The tax cannot be assessed in either mode pointed out by the statute."

Pfaffinger v. Kremer, 115 Ky., 498, is also relied on. But neither is that case applicable to the facts of the case here presented, because in that case the court rested its decision on the ground that the tax amounted to a spoliation, and, further, was an effort to subject property outside of the improvement district to the payment of the tax.

It is well recognized that it is utterly impracticable in many instances to devise a scheme of taxation for street improvement that will not operate unequally upon some property owners. In spite of all that can be done, cases will arise in which some property owners will pay more tax than they ought to pay and some less than they ought to pay. But the general thought running through laws placing burdens for improvement taxes is to tax all property once and to avoid taxing it twice, unless it be that the property fronts on two streets; and this principle applies whether the territory contiguous to the public way improved is defined into squares by principal streets or is not defined into squares. Keeping in mind this equitable and fair principle, it is apparent that, unless the property here in question that lies between Park Boundary Road and the right angle line is taxed, it will escape taxation entirely, because Park Boundary Road is an improved street and the property of these appellants fronting on this street and running back to the right angle line would escape taxation entirely. Marret v. Jefferson County Construction Co., 161 Ky., 845.

The council, in adopting this ordinance, evidently treated Park Boundary Road and Alta Avenue as principal streets and directed that the improvement tax should extend from Barney Avenue a distance of 378 feet, so as to include all the property between Park Boundary Road and Alta Avenue; and, treating Park Boundary Road and Alta Avenue as principal streets, we think the council had the right to do this. If this scheme is not adopted, then an additional burden will

necessarily fall upon the property that is within the lines drawn at right angles, because the burden of the tax imposed on the property mentioned that lies outside the line would be shifted to the property within the right angle lines.

It happens in this particular instance that a heavier burden is imposed upon the property abutting on Park Boundary Road than is imposed upon that abutting on Alta Avenue, due to the fact that Park Boundary Road for part of the 378 feet runs outside a line drawn at right angles from the intersection of Barney Avenue with this road; while, on the other hand, only a few feet of the property fronting on Alta Avenue extends as far as a right angle line, because Alta Avenue, after leaving Barney Avenue, deflects in a westerly direction, so that the lots that front on Alta Avenue 300 feet, for example, from Barney Avenue are not so deep as are the lots fronting immediately on Barney Avenue.

Thus, on account of the irregular lines of streets, it sometimes happens that more frontage will be subjected to the improvement tax immediately at the street to be improved than will be subjected one hundred feet from the street. Then, again, more property may be subjected to the improvement tax a hundred feet from the street to be improved than will be subjected immediately on this street. But conditions like this and the unequal burdens that follow are unavoidable.

Upon the whole case, we think the judgment of the lower court was correct, and it is affirmed.

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### Hunter, et al. v. Big Four Auto Company.

(Decided February 16, 1915.)

#### Appeal from Warren Circuit Court.

1. **Contracts—Prohibited by Statute Not Enforcible.**—An individual partnership doing business under an assumed name, without complying with the requirements of Section 199b of the Kentucky Statutes, which provides that no persons shall carry on or transact any business under an assumed name or name other than the real name of the individuals conducting the business, unless they shall file a certificate setting forth the names of the parties and also the assumed name, and which fixes a penalty for violation of the Statute, could not recover on a contract when the Statute



was interposed as a defense, although the defendant had received and retained property under the contract.

2. **Business—Carrying On Under Assumed Name.**—Under Section 199b of the Kentucky Statutes individuals cannot lawfully carry on business under an assumed name without observing the requirements of this Section, and unless the statute is observed the persons carrying on the business under the assumed name cannot enforce rights arising under contracts made in the conduct of their business.

T. W. & R. C. P. Thomas for appellants.

SIMS & RODES for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

This suit was brought by P. L. Patterson, Joe Lucas, James Massey, and S. A. Kelly, partners, doing business under the assumed name of the "Big Four Auto Company," against the appellants, as defendants, to recover \$284, the amount of two notes executed by the defendants to the Big Four Auto Company, growing out of some transactions between the parties about an automobile.

The defendants, for the purpose of defeating the action, pleaded and relied on Section 199b of the Kentucky Statutes, the first sub-section of which reads as follows:

"No person or persons shall hereafter carry on or conduct or transact business in this State under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct or transact or intend to conduct or transact such business, a certificate setting forth the name under which said business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the postoffice address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct, said business."

Sub-sections two and three relate to the certificate. Sub-section four exempts corporations and partnerships

from the application of the statute, with the proviso that "such partnership name or designation shall include the true real name of at least one of such persons transacting business."

Sub-section five, prescribing a penalty for the violation of the statute, reads: "Any person or persons carrying on, conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this act, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned in the county jail not less than ten days nor more than thirty days, or both so fined and imprisoned, and each day any person or persons continue to conduct business in violation of this act shall be deemed a separate offense."

The trial court sustained a general demurrer to this answer, and the defendants appeal.

This act does not in terms say that it shall be "unlawful" for any person to carry on or transact business under an assumed name, but it is manifest that it was the purpose of the act to make it unlawful, or else the penalty prescribed by sub-section five would not have been imposed. In view of the fact that this section expressly provides that any person who fails to comply with the provisions of the act shall be guilty of a misdemeanor and subject to a fine and imprisonment, it would be disregarding the purpose of the act, when considered as a whole, to say that the Legislature did not intend to make it unlawful to transact business without observing the requirements of the act. If the Legislature had said in so many words in sub-section one that "it shall be unlawful for any person or persons to carry on or transact business under an assumed name," it would not have made any plainer the fact that the Legislature intended to make this method of transacting business unlawful.

It being then the intention of the Legislature to make the transaction of business under an assumed name unlawful, unless the requirements of the statute are observed, the only remaining question is, does the fact that the Legislature has made the doing of a thing unlawful, prohibit the person engaged in the unlawful thing from maintaining an action to enforce a contract right wholly created in the doing of this unlawful and forbidden thing?

In *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky., 504, a question so similar to the one here presented that no distinction can be made between them was before the court, and in the course of the opinion it was said: "The statute does not provide that contracts entered into before it has been complied with shall be void or non-enforceable, nor does it use any language in reference to the contract; but, when a statute makes it unlawful to do business under certain conditions, it seems to necessarily and logically follow that the doing of the business under the prohibited conditions is in itself unlawful. When the doing of the act is made unlawful, there is no reason why the statute should also declare that contracts made in violation of it should also be unlawful. When the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law. Their chief purpose is to secure the observance of laws enacted for the safety and protection of life and property, and the general well-being of the people, and it would be a startling departure from this purpose if they should also give relief to parties who were seeking to enforce contracts made in violation of law. Such a course of procedure would be a perversion of justice and convert the courts into instruments to aid law-breakers in place of punishing them."

Again, in *Oliver Co. v. Louisville Realty Co.*, 156 Ky., 628, the question was thoroughly considered and the ruling in the *Chatterson* case adopted and approved. And it seems to us that these decisions control this case.

In *Cashin v. Pliter*, 168 Mich., 386, 28 A. & E. Ann. Cases, 697, the Supreme Court of Michigan had before it a question in all respects similar to the one here involved. The Michigan statute before the court prohibited the transaction of business under an assumed name or any other than the real name of the individual or owner conducting same, unless a certificate was filed such as is provided for in our act. It does not appear from the opinion that the act expressly made it unlawful to conduct the business without filing the required certificate, but it did make the violation of the act a misdemeanor punishable by fine and imprisonment.

It further appears that Cashin and certain other individuals were doing business in the firm name of Flint Construction & Realty Co., and that in this name they entered into a contract with Pliter to build him a house for an agreed sum. That after they had completed the house according to contract, Pliter refused to pay a balance due, whereupon suit was brought against him. His defense was that the plaintiffs were doing business in violation of the statute, and, therefore, could not recover. In that case, as in this, the argument was made on behalf of the plaintiffs that the act was a penal statute, not implying or intending any other punishment or loss to those violating it than that expressly provided by the fine and imprisonment. That it had no application in a case where the defendant knew who the members of the concern were with which he dealt, and that as they had fully performed the contract, and he had received the benefits thereof, they were entitled to recover the amount sued for. But the court, rejecting this view and denying a recovery, said that the act was founded on public policy, came within the police power of the State, and was intended to protect the public from imposition and fraud. That the labor and material was furnished under an illegal contract by virtue of which there could be no recovery.

The case of *Gay v. Seibold*, 97 N. Y., 472, 49 Am. Rep., 533, is relied on by counsel for the appellees as taking a different view of this question from that announced by this court and the Michigan court, but an examination of this case shows that the court, in holding a contract that it was claimed violated a statute of New York, in some particulars like ours, enforceable, put its decision distinctly on the ground that the statute was not intended to be applicable to a state of case such as was presented to the court, saying:

"This case is not, therefore, within the purpose or intention of the statute, and such a transaction is not one of the mischiefs sought to be remedied by the statute. Therefore, although this transaction should be held to be within the letter of the statute, it is clearly not within the purpose and intention of the statute, and hence it is outside of the statute. It is a rule peculiarly applicable to the construction of penal statutes that a thing within the letter of a statute is not within the statute unless within the intention thereof; and so, too, in the construction of

remedial statutes, it is generally held that a thing within the intention is within the statute, though not within the letter."

The case before us, however, comes not only directly within the letter, but directly within the intention of the statute. The statute was intended to prohibit exactly what the plaintiffs were doing, unless they filed the certificate required. The Legislature undoubtedly had the power to enact this statute and prescribe a penalty for its violation. And when the Legislature, within its authority, enacts a law making it a punishable offense to do certain things, it may be considered as a closed question that this court will not lend such aid to the persons doing the prohibited things as will enable them to violate the law with impunity.

It is probable that a rule like this may, in some instances, work a hardship by permitting one person to get the benefit of another person's labor, service or property without compensation. But, as said in *Oliver Co. v. Louisville Realty Co*, *supra*, "the fact that enforcement of the statute may work hardships on corporations that fail to obey it cannot, without ignoring the legislative intent, be allowed to defeat the object sought to be accomplished by the enactment of the law. Every person who violates the law puts himself in the attitude of being required to pay the penalty for the infraction; but, although the delinquency may subject him to punishments, civil or criminal, this of course furnishes no reason why the statute should not be enforced. The individual who violates a penal statute may expect to pay the penalty, and so a corporation that violates the civil features of a statute is not in any position to complain if it, too, must pay the penalty."

Also, in *Cashin v. Pliter*, *supra*, the court, in answer to the argument that the defendants should be estopped from relying on the statute to defeat the collection of a just debt, said: "In behalf of the plaintiff it is urged that, the contract having been performed and labor and material having been furnished, of which defendant retains the benefit, recovery can be had therefor under the common counts, on an implied promise to pay for the same what they are reasonably worth. But they were furnished under an illegal express contract, by virtue of which there can be no recovery. \* \* \* In such a case, the doctrine of estoppel cannot be invoked by the

plaintiff; but the law leaves the parties where it finds them and refuses relief. It recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff."

For the reasons stated the judgment is reversed, with directions to overrule the demurrer and for proceedings not inconsistent with this opinion.

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**Walker, et al. v. Maddox.**

(Decided February 16, 1915.)

**Appeal from Carter Circuit Court.**

1. Deeds—Cancellation—Mental Incapacity—Evidence.—In an action to cancel a deed because of the mental incapacity of the grantors, evidence examined, and held that the grantors had sufficient mental capacity to know and appreciate the effect of the deed which they signed.
2. Deeds—Consideration—Support of Grantors—Violation of Agreement—Evidence.—Where the grantors conveyed to their daughter their home place, the consideration being that the daughter should maintain and support them during their life, held, in an action by one of the grantors to cancel the deed because the grantee had failed to carry out her agreement, that the grantee had not failed to comply with her agreement, and that there was no valid reason to cancel the deed.
3. Deeds—Trusts.—Where a husband freely and voluntarily unites with his wife in a deed conveying certain land to his daughter in consideration of support, he parts with all interest in the land, and is not entitled to have a trust declared in his favor on the ground that, though the deed was made to his wife, he furnished the money to pay for the land.
4. Deeds—Consideration—Agreement to Support.—Where the grantor executed a deed in consideration of the grantee's agreement to support and maintain him during his natural life, and he voluntarily leaves the grantee's home, held, that an allowance of \$100 to him while living away from the grantee's home was sufficient, in the absence of such mistreatment on the part of the grantee, or such friction as made it no longer agreeable to him to live there, or the refusal of the grantee to permit him to live there.

G. W. E. WOLFFORD for appellants.

THEOBALD & THEOBALD for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

On June 10, 1909, Gemina Walker and her husband, George W. Walker, conveyed to Nancy Maddox, their daughter, a tract of land in Carter county. The deed recites that the consideration is \$500 cash and an agreement on the part of Nancy Maddox to support and maintain the grantors during their lives. The land conveyed was a tract of land that had been conveyed to Gemina Walker in the year 1874. Nancy Maddox and her husband moved on the premises and proceeded to carry out their agreement. About three years thereafter Gemina Walker died. After her death George Walker was persuaded to leave the house of his daughter and take up his residence with his son William.

This action was brought by George W. Walker and certain of his children to have a trust in the property declared in favor of George W. Walker, because he had paid for the land with his money, though the deed was taken in his wife's name. They also asked that the deed be canceled because of the incapacity of the grantors and because of the failure of Nancy Maddox to carry out her part of the agreement. By amended petition George W. Walker asked that an allowance be made to him for his support and maintenance. The petition of the plaintiffs other than George W. Walker was dismissed. The only relief granted George W. Walker was a judgment directing Nancy Maddox to pay him at the rate of \$100 a year when not at her home, the allowance to cease in the event he returned. From that judgment this appeal is prosecuted.

The evidence conclusively shows that both Gemina Walker and George Walker had sufficient mental capacity to know and appreciate the effect of the deed which they signed. The contract was not made by reason of any influence which Nancy Maddox exercised over her parents. They were growing old, and not being able to do the work that they had formerly done and to look after their little home in a proper manner, asked their daughter, Nancy Maddox, to come and live with and take care of them. In consideration of these attentions they agreed to convey their home to her. The contract was freely and voluntarily entered into by the parties. While the deed recites a cash consideration of \$500, it is admitted that this provision was inserted in the deed at the suggestion of the parties and of the scrivener, merely for the purpose of giving legal effect to the instrument.

The \$500 was not a part of the consideration, and was not intended to be paid. The evidence further shows that Gemina Walker and George Walker were pleased with the arrangement. For the three years that they resided with Nancy there was no misunderstanding or complaint. It was only when Nancy and her husband conveyed the land in controversy to her brother and sisters, the deed to take effect after the death of her mother and father, that any misunderstanding arose. The friction resulted from the displeasure of the other children of George W. Walker growing out of the fact that they were not included in the conveyance which Nancy Maddox had made. Thereupon George Walker went to live with his son William. George Walker gives no instances of any mistreatment by his daughter. He simply complains in a general way that she did not talk to him as she should. Indeed, the evidence shows that she provided for his needs in every proper way, and that he had no reasonable excuse for abandoning her home. There was, therefore, no valid reason why the deed in question should have been canceled.

It is unnecessary to consider the question of trust. It is sufficient to say that when George W. Walker, who had the mental capacity to contract, freely and voluntarily and for a valuable consideration united with his wife in the deed in question, whatever interest he had in the property passed to his daughter Nancy.

The chief complaint of the appellant is that suitable provision for his support was not made in the event that he remained away from his daughter's home. Fairly considered, however, the contract did not contemplate that he should be supported elsewhere than at his daughter's home. The circumstances do not show that he had any reasonable grounds for leaving her home. The judgment does not deny him the right to return. It gives him that right, and, in lieu thereof, an allowance of \$100 a year in the event that he elects to stay elsewhere. This is not a case where the grantee was at fault or the friction so great that permanent provision should be made for the support of the grantor elsewhere than at the grantee's home. It is a case where the grantor is welcome to return and should return. The grantor did not ask that the case be referred to the master commissioner to determine what was a reasonable sum for his maintenance and support if he



lived elsewhere. The grantor did not himself testify as to what would be a reasonable sum under the circumstances, but merely claimed that he had agreed to pay his son \$16 a month board. There being no request for a reference to the commissioner, and no competent evidence tending to show what would be a reasonable allowance under the circumstances, we are not disposed to disturb the finding of the chancellor, who evidently believed and had reasonable grounds to believe that the allowance should not be fixed so high as to make it an inducement to others to persuade their father to leave his daughter's home, where she had the right to support him, and where it was his duty to remain, in the absence of such mistreatment or of such friction that made it no longer agreeable to him to live there.

Judgment affirmed.

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### **Burton v. Monticello and Burnside Turnpike Company.**

(Decided February 17, 1915.)

#### **Appeal from Wayne Circuit Court.**

1. **Constitutional Law—Section 51 of Constitution.**—The purpose of Section 51 of the Kentucky Constitution, which provides that no law enacted by the General Assembly shall relate to more than one subject, which shall be expressed in the title, was to enable persons reading the title of an Act to get a general idea of what the Act treated, or contained, so that the members of the Legislature as well as the public interested in legislation could rely on the title as indicating the subject-matter of the Act, and to assume that the Act contained no legislation that was not embraced, in a general way, by the subject expressed in the title.
2. **Constitutional Law—Section 51 of Constitution.**—No provision of a Statute directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of Section 51 of the Constitution, which provides that no law enacted by the General Assembly shall relate to more than one subject, which shall be expressed in the title.
3. **Statutes—Sections 39 and 40, Acts 1912, p. 309—Road Engineer—Public Roads.**—Sections 39 and 40 relating to the construction of turnpikes owned by individuals or corporations, and prescribing the tolls to be charged for their use, and constituting a part

of the Act of 1912, entitled "An Act defining public roads—Providing for their establishment, regulation and construction, and use and maintenance—Creating the office of Road Engineer, and prescribing the duties thereof" (Acts 1912, p. 309), are not germane to the subject-matter contained in the title, and are unconstitutional.

4. Statutes—Title—Constitutional Law.—When a subject foreign to the title is introduced into the body of an Act, if it is so separate and distinct from the remainder of the subject-matter of the legislation that it may be omitted without affecting the otherwise valid portions, the unconstitutional part will be omitted, and the remainder allowed to stand.
5. Turnpikes and Toll Roads—Vehicles.—It is not the model or the name of a vehicle but the purpose for which it is used that fixes its toll charge for using a turnpike road having the right to charge tolls.
6. Turnpikes and Toll Roads—Statutes—Stage Coaches—Automobiles.—Under a statute which prescribed tolls to be charged for the use of turnpikes by "vehicles," "pleasure carriages or hackney coaches," "stage coaches," and "traction or other engines," but failed to fix a charge for automobiles using the turnpike, automobiles will be classed as "stage coaches," where they are used by a stage coach line in the place of stage coaches.
7. Statutes—Turnpikes and Toll Roads—Tolls—Vehicles.—Under a statute prescribing tolls to be charged for the use of turnpike roads, and exempting certain specified vehicles from tolls, it is not to be presumed that the Legislature intended to exempt from tolls a new type of vehicle, having a new name, but performing the same service that was formerly rendered by a vehicle named in the statute.

WESLEY & BROWN, J. M. KENNEDY and DUNCAN & BELL  
for appellant.

O. H. WADDLE & SONS and HARRISON & HARRISON for  
appellee.

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Affirming.

The appellee, the Monticello and Burnside Turnpike Company, is a corporation created in 1881, by an Act of the General Assembly, which authorized it to construct and maintain a turnpike road from Monticello, Kentucky, to Burnside, Kentucky, a distance of 20 miles. Said road was constructed and tollgates placed thereon at intervals of five miles, at which tolls were collected in accordance with schedules established by law. For several years before the institution of this action the ap-

pellant, Burton, was engaged in operating and running stage coaches and other vehicles on appellee's road, on which he carried the United States mails, express, and passengers for hire. He paid the tolls upon his stage coaches; as the law prescribed, but under protest.

Between June 18th, 1912, and January 31st, 1914, appellant paid in tolls for the use of appellee's turnpike road the sum of \$3,359.51, of which amount \$1,939.09 represented tolls paid on automobiles.

During the period mentioned appellee's turnpike was less than ten feet wide, and, according to the allegations of the petition, it did not have a smooth road-bed, and was neither well ditched nor drained, as required by the Act of 1912.

In March, 1914, Burton brought this action to recover said sum of \$3,359.51 from the turnpike company upon the ground that, during said period between June 18th, 1912, and January 31st, 1914, said turnpike and each section thereof was less than ten feet wide; it did not have a smooth road-bed; and was neither well ditched nor well drained.

The trial court having sustained a demurrer to the petition, the plaintiff, Burton, appeals. Several grounds were relied upon to defeat the action; but, under our view of the case, it will be sufficient to consider the single question, whether the Act of 1912 violates Section 51 of the Constitution of Kentucky.

That section reads, in part, as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

The title of the Act approved March 18th, 1912, under which this suit was brought, reads as follows:

"An Act defining Public Roads—providing for their establishment, regulation and construction and use and maintenance—creating the office of Road Engineer, and prescribing the duties thereof." Acts 1912, p. 309.

The first section of said Act defines public roads as follows:

"All public roads on which the several county courts have heretofore appointed surveyors to work the same, and allotted hands therefor, which have not been vacated according to law, are hereby declared public roads, without regard to any informality in the orders of the county court by which they were established. A public road

shall be deemed to include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, and all bridges having a span of five feet or less."

Sections 2 to 35, inclusive, of said Act relate to the construction, acquiring, management, and protection of the public roads of the county.

Section 36 reads as follows:

"No tolls other than for the maintenance of such road or bridge shall be charged or collected for traveling upon any of the public roads or over any of the public bridges of this State except those which are now collecting such tolls according to the laws of this State."

Sections 39 and 40, which relate to tolls to be collected for the use of turnpikes owned by individuals or corporations, and under which this action is brought, read as follows:

"On all turnpikes now owned, wholly or in part, by individuals or corporations in this State, tolls not exceeding the following rates may be received in every section of five miles which has been completed, to-wit: For a single horse, mare, gelding, mule or jennet, in addition, one cent, if the same be not hitched to any vehicle; for twenty sheep or hogs, five cents; and for twenty cattle, ten cents, and so on in proportion for a greater or less number; for a riding carriage, whether two or four wheeled, if the road be a macadamized road or a brick road or some other permanently improved road, ten cents; but if not macadamized or not a brick road or other permanently improved road, five cents; and for a cart or wagon, if the tires of the wheels are less than four inches wide, three cents for each animal drawing it; for automobiles, fifteen cents; and for motorcycles, ten cents; and for motor driven vehicles, fifteen cents. For a fractional part of a section, tolls may be received bearing the same proportion to the tolls for a full section that the said fractional part bears such full section. Provided, That when the toll from the fractional part would be less than one cent they may charge and receive one cent. Provided, further, That all coaches, carriages, vehicles and horses used by persons going to and from divine worship, funerals, schools and grist mills for the purpose of having grinding done, shall be exempt from tolls."

"Section 40. The said tolls may be demanded and collected of every person passing the tollgate, whether

he shall have traveled the whole or only a part of the section or fractional part. Provided, That the said toll road or turnpike shall be made so as to conform to the following specifications: All roads or turnpikes shall have a smooth road-bed of not less than ten feet in width, exclusive of ditches, and shall be well side ditched and drained. All cross-drains shall be underdrained or ripped when necessary. All running streams requiring bridges of fifty feet in length or less, and such others as the fiscal court of the county may direct, shall have a bridge or culvert across same sufficiently strong and sufficiently wide to insure safe passage to all kinds of vehicles. Provided, further, That no toll shall be collected unless such toll road or turnpike be constructed in accordance with this section."

Section 48 creates the office of County Road Engineer, while Section 52 provides that the County Road Engineer "shall have general charge of all public roads and bridges within his county, excepting turnpikes or bridges owned by or maintained wholly by some citizen or company."

All told, the Act contains 97 sections, but, for the purposes of this case, it is unnecessary to give any further enumerations or provisions thereof, since the invalidity of Sections 39 and 40, under which this suit is brought, is decisive of the case.

It will be remembered that the title of the Act describes it as "An Act defining public roads—providing for their establishment, regulation, construction and use and maintenance—creating the office of Road Engineer and prescribing the duties thereof." In short, the title speaks solely of public roads and county road engineers; it does not even refer to anything else.

While the many sections of the Act which treat of public roads and county road engineers are germane to the subject matter of the title, it is plain beyond question that Sections 39 and 40, which relate to the collection of tolls upon turnpikes, individually owned, and prescribe the specifications for such turnpikes, have not the remotest connection with the subjects mentioned in the title of the Act. There is not a word in the title from which any person could infer that the Act contained the subject matter of Sections 39 and 40, relating to the construction of turnpikes owned by individuals and corporations, and the tolls to be charged for their use.

In *Hyser v. Commonwealth*, 116 Ky., 410, it was said: "This court has repeatedly announced, in effect, that no provision of a statute directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of Section 51 of the Constitution."

This broad, liberal rule was approved in the early leading case of *Phillips v. Cincinnati & Covington Bridge Co.*, 2 Met., 219; and again in *Collins v. Henderson*, 11 Bush, 74; *Hoke v. Commonwealth*, 79 Ky., 567; *Commonwealth v. Bailey*, 81 Ky., 395; *Burnside v. Lincoln County Court*, 86 Ky., 423; *Conley v. Commonwealth*, 98 Ky., 125; and *Eastern Kentucky Coal Lands Corporation v. Commonwealth*, 127 Ky., 667.

In recognizing this rule, however, this court, in *Thompson v. Commonwealth*, 159 Ky., 12, further said:

"But in no instance has this rule been extended so as to legalize legislation that departs so radically from the title of the Act as do the sections here under consideration. Here the title of the Act limited the scope of the legislation to the appropriation of money for the benefit of the Houses of Reform, and this limitation in the title reasonably and naturally conveyed the meaning that the body of the Act was confined to the appropriation of money and no other subject.

"The purpose of the constitutional provision was to enable persons reading the title of an Act to get a general idea of what the Act treated of or contained, and it has come to be a recognized legislative practice for members and others interested in legislation to read the title of Acts and gather therefrom, in a general way at least, the subject matter of the Act, and under the authority of this constitutional provision members of the Legislature, as well as the public interested in legislation, have the right to rely on the title as indicating the subject matter of the Act, and to assume that the Act contains no legislation that is not embraced in a general way by the subject expressed in the title. But, if it were allowable to insert sections in an Act entirely foreign to the scope of the legislation as expressed in the title, the purpose of the Constitution would be entirely defeated and much legislation would be enacted that the members would not have approved had they known that it was contained in the Act."

See also *Henderson Bridge Company v. Alves*, 122 Ky., 46; *Board of Trustees v. Tate*, 155 Ky., 296. Sections 39 and 40, *supra*, not only have no natural connection with the subjects expressed in the title, but they are entirely foreign thereto, and consequently violate Section 51 of the Constitution.

2. But in holding Sections 39 and 40 invalid for the reason above stated, we must not be understood to mean that the other sections of the Act, which are germane to the subject matter of the title, are invalid. It is manifest that Sections 39 and 40 can be eliminated from the Act without interfering with or affecting in any manner the subject matter of the germane sections, and whenever this can be done so as to leave a complete statute, the statute thus expurgated will be treated as constitutional.

This rule was announced in *Wiemer v. Commissioners of the Sinking Fund of Louisville*, 124 Ky., 377, as follows:

“When a subject foreign to the title is introduced into the body of an Act, if it is so separate and distinct from the remainder of the subject matter of the legislation that it may be omitted without affecting the otherwise valid portions, then the unconstitutional part will be omitted and the remainder allowed to stand.”

*Jones v. Thompson*, 12 Bush, 394; *Fuqua v. Mullins*, 13 Bush, 667; *Brown v. Moss*, 126 Ky., 833; *Thompson v. Commonwealth*, 159 Ky., 11, are to the same effect.

3. Section 39 of the Act of 1912 was, however, the first legislative recognition, in specific terms, authorizing turnpike companies to collect tolls for the use of turnpikes by automobiles; and appellant contends that if Section 39 is invalid, then there is no law under which appellee could legally have collected the \$1,139.09, which appellant paid as tolls upon automobiles.

Section 39, *supra*, being invalid, appellee's right to charge and collect tolls was governed by Section 4724 of the Kentucky Statutes, which fixed the tolls, in part, as follows: “For each vehicle drawn by one horse or mule, 10 cents; for each vehicle drawn by two horses, mules, or oxen, 20 cents; for each pleasure carriage or hackney coach drawn by three horses or mules, 25 cents; for same when drawn by four horses or mules, 30 cents; for each stage coach having seats within for six passengers, 35 cents; for same for nine passengers, 55 cents; for same for twelve passengers, 75 cents, and 2 cents in addition

for every passenger over four; for each traction or other engine, \$1.00."

The appellant's automobiles were used in the place of stage coaches, and served the same purpose as stage coaches.

Appellant insists, however, that an automobile operated for hire, is neither a "pleasure carriage nor hackney coach drawn by horses or mules," a "stage coach," a "vehicle drawn by horses, mules or oxen," or a "traction or other engine;" and that no charge can be made for an automobile.

But should the fact that automobiles were unknown by that name when Section 4724, *supra*, was enacted, exempt them from the payment of tolls? We think not.

In *Burton v. Monticello & Burnside Turnpike Co.*, 33 Ky. L. R., 85, 109 S. W., 319, which was an action by this appellant to recover tolls from the appellee, the court said:

"The statute recognizes a distinction between pleasure coaches or hackney coaches on one hand and stage coaches on the other. A hackney coach is a coach which is hired out; a stage coach is one which is used by the owner to carry passengers from one point to another. A stage coach is not hired out. It remains in the possession of the owner. Under the agreed facts, appellant's vehicles were stage coaches and were properly charged tolls as such. They were used for the carrying of passengers, express matter, and the mails between Burnside and Monticello."

It will be noticed that the court held it was not the model or the name of the vehicle, but the purpose for which it was used, that fixed its toll charge.

We see no serious difficulty in applying Section 4724, *supra*, to the case of automobiles using a turnpike, although automobiles are not named therein. Certainly the Legislature did not intend to exempt from tolls one of the most destructive of all vehicles used upon the turnpikes of the State.

In 38 Cyc., 397, it is said:

"Where a different rate of toll is chargeable on different classes of vehicles, such as wagons, hackney coaches, and pleasure coaches, the class in which a conveyance belongs is to be determined by the meaning of the vehicle named, and where a conveyance is within both a general and a specific class, it is deemed, for the



purpose of toll, to be within the specific class. In this connection the words 'pleasure carriage' are broad enough to include any vehicle used for the carriage of passengers, such as an automobile." See *Scranton v. Laurel Run Turnpike Co.*, 225 Pa. St., 82.

In *Proctor v. Crozier & Marshall*, 6 B. Mon., 268, it was held that a stage coach properly falls in the grade of pleasure carriages, for the purpose of collecting tolls under a statute that did not provide for rates on stage coaches, the court saying:

"But, waiving this view of the subject, we are satisfied that the Legislature, by the latter act, never could have intended otherwise than that stage coaches, as well as all other vehicles, should be liable to pay tolls. This is a State road, made at the expense of the State, and why should stage coaches employed in carrying the United States mail be exempt from the payment of tolls? The road would be cut up and worn by its travel as much as by the travel of most of the other vehicles, and the United States, if, instead of her own postroads, uses the roads furnished at the cost and expense of the State, she is able to pay, and should be made liable to pay, the same rates of toll as our own citizens are required to pay, as was decided by this court in the case of *Dickey v. Maysville and Lexington Turnpike Road Company*, 7 Dana, 113."

Section 4724, *supra*, fixes a toll of 25 cents for each "pleasure carriage drawn by two horses," and a toll of 30 cents for each "pleasure carriage drawn by four horses." Can it be said that no toll could be charged for a pleasure carriage drawn by *three* horses? Clearly not. But, as above pointed out, the statute provides a toll for each stage coach, and under the authorities above cited, we think it is clear that an automobile used in the place of a stage coach for the carriage of the mails, freight or passengers, is a stage coach within the meaning of the statute. To hold otherwise would be giving the statute a strained construction, and one never contemplated by the Legislature.

Under this view of the statute it becomes unnecessary to discuss the contention of appellee that the provision allowing a toll of \$1.00 "for each traction or other engine" may be made to cover the case.

Sections 39 and 40 of the Act of 1912, being invalid, and Section 4724 of the Kentucky Statutes being broad enough to authorize the collection of tolls upon automobiles, it follows that the circuit court properly sustained the demurrer to the petition.

Judgment affirmed.

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**Thornton, et al. v. White, et al.**

(Decided February 17, 1915.)

**Appeal from Marion Circuit Court.**

1. **Schools and School Districts—Taxes—Apportionment Between White and Colored Schools.**—Where taxes are levied by a graded white common school district upon the property of a railroad or bridge company within such district, they, when collected, must be apportioned between it and any graded common school for colored pupils having the same boundary as the white district, as provided for in Section 4101 Kentucky Statutes.
2. **Schools and School Districts—Trustees of Graded Common Schools—Expenditures.**—The trustees of a graded common school district are restricted in the expenditure of the public moneys coming to them, to such purposes only as are authorized by the laws governing the management and control of the schools.
3. **Schools and School Districts—Truant Officer—Payment of Salary.**—A graded white school district having the same boundary as a graded colored school district, can not employ a truant officer and require the colored district to pay any part of his salary, although he may have performed service for both the white and colored school.

H. S. McELROY for appellants.

C. C. BOLDRICK and W. H. SPRAGENS for appellees.

**OPINION OF THE COURT BY JUDGE HURT—Affirming.**

It is gathered from the pleadings in this case that the city of Lebanon, which is a city of the fourth class, had organized a system of graded free common schools for the education of white and colored children resident in the city, and which had been organized in accordance with Section 3588 of Kentucky Statutes. It is not clear from the pleadings as to whether or not the city council, after the enactment of Section 3588a of Kentucky Statutes, by ordinances, adopted by the general council

of the city, organized a graded free common school for the white pupils and a graded free colored school for the colored pupils, as it is provided that it may do by Section 3588a. The petition, however, describes the appellees as the board of trustees of the graded free common school for colored pupils, and the appellants as the board of trustees for the graded free common school for white pupils, and that the boundaries for the two districts are the same, and that they are the same as the limits of the city. These allegations are not controverted by the answer, and there being no provision of the statute authorizing the existence of such a state of facts except Section 3588a, *supra*, we presume that the city council, in accordance with and by virtue of the provisions of that statute, organized the two school districts. The ordinances by which the two districts were established, although referred to in the answer, and made a part of it, are not copied into the record.

Section 3596 of the Kentucky Statutes, and which is a part of the charter of the cities of the fourth class, provides that the board of education in cities of the fourth class shall provide and maintain a building and teachers for schools for the black pupils, but it seems that under that section the board of education, who has charge of schools in cities of the fourth class, and provided for by Section 3588, *supra*, is the authority which must control and manage such schools, unless the city council has provided for a graded free common school for white persons and a graded free common school for colored persons, as provided for in Section 3588a, *supra*, in which event each of the said schools passes into the control and management of a board of trustees provided for in said statute, and the board of education provided for in Section 3588 no longer has control of such schools, if it continues to exist, because 3588a provides that a system of schools may be provided for, as permitted by that section, and that each school shall be governed and controlled by a board of six trustees, elected or appointed, as now provided by general law, for the government of graded free white and colored schools. Said section, further, provides that each of the schools shall be maintained by its pro rata share of the State school fund, which shall be paid direct to the trustees or their treasurer, and that the city council shall, by its ordinances, prescribe the maximum rate of taxation which

may be levied for the white school upon the polls and property of white persons and corporations within the city, and by the colored board of trustees upon the polls and property of colored persons within the city. The statute also provides that the taxes raised from the polls or property of any white person or corporation shall not be used for the support of the graded free common school for colored pupils, nor the tax raised from the polls or property of the colored people shall not be used for the maintenance of the white school. This statute further provides that after the system of graded free white and colored common schools has been established, as provided by that statute, they shall be managed, maintained, and controlled as provided for by the general law for the control, management, and maintenance of graded schools.

The pleadings show that for the years 1909, 1910, 1911, 1912, and 1913, a tax for school purposes was levied upon the property of persons and corporations situated within the boundaries of the school districts and the city, and was collected and all of it paid to the appellants as the board of trustees for the graded free white common school. It does not appear what authority levied the taxes, but we presume it was done by appellants, and within the authority given it by the city council by ordinances fixing the maximum rate of taxation, which it was authorized to levy and collect as provided for by Section 3588a, *supra*. Included in the tax upon corporations was a tax for each of these years levied upon and collected from the property of the Louisville & Nashville Railroad Company, two branches of which extend into and through the districts, one of which is the Louisville & Knoxville branch, and the other called the Cumberland & Ohio branch of the Louisville & Nashville system.

The appellees, as the board of trustees for the graded free common school for colored pupils, brought this suit against the appellants, as the board of trustees of the graded free common school for white pupils, and against the Louisville & Nashville Railroad Company to recover such a proportion of the taxes collected from the company as the colored pupils in the city bear to the entire number of pupils in the district within the school age. The appellants, by answer, controverted the legal right of appellees to receive any part of these taxes, and likewise alleged that for those years it had employed a truant

officer who did services for both schools, alike, and for whose services it was required to pay, and asked to have set off against any recovery which appellees might make against it such an amount of the total sum paid to this truant officer in the proportion that the number of colored children in the districts bears to the number of all pupil children in the districts. The Louisville & Nashville Railroad Company filed an answer denying the right of appellees to recover, and alleging that it had paid the taxes to the city of Lebanon, and made its answer a cross-petition against the appellants and the city of Lebanon, and asked that, in the event there should be any recovery by appellees against it, that it have a judgment for a like sum against appellants and the city of Lebanon, upon the ground that it had paid the taxes to the city under a mistake of law and of fact.

The appellants filed a special demurrer to the petition of the appellees, insisting that there was a defect of parties plaintiff, in that the suit was not brought in the name of the Commonwealth for the use and benefit of the appellees, and that there was a defect of parties defendants, in that the city of Lebanon was not made a party defendant. The appellants also filed a general demurrer to the petition. The Louisville & Nashville Railroad Company filed a general demurrer to the petition, and the city of Lebanon filed a general demurrer to the cross-petition of the railroad company. Upon a hearing the court overruled the demurrers filed by the appellants, but the demurrer of the railroad company seems not to have been passed upon, neither was the demurrer of the city of Lebanon to the cross-petition of the railroad company passed upon. The appellees demurred generally to the answer of the appellants and also to the answer of the railroad company. The court sustained the demurrer to the answer of appellants, but the one to the answer of the railroad company was not passed upon nor disposed of.

The appellants failing to plead further, the court rendered judgment against them for the amounts sued for, proper objections were made and exceptions taken by the appellants to the judgments of the court.

The appellants complain of the action of the court in overruling their demurrers to the petition, and likewise sustaining the demurrer to their answer, and they appeal to this court.

Section 4470, Kentucky Statutes, provides that the trustees of a graded common school may sue and be sued in the name of the board of trustees for the district, and a suit in the name of certain persons as the trustees of a graded free common school district is a substantial compliance with the statute, and it does not appear that the city of Lebanon has any interest in the controversy, and for these reasons the special demurrer of appellants does not seem to have been well taken.

The demurrer of appellants to the petition will determine the right of the appellees to recover of appellants the portion of the taxes collected from the railroad sued for. Section 4101, Kentucky Statutes, is as follows:

"The provisions of this law shall not be construed to apply to any colored school district: Provided, That the same rate of taxation assessed against the real estate of any railroad or bridge company, or corporation in any graded school district or common school district, in any year, shall be assessed against all of the taxable property in such district, and the railroad or bridge tax, when collected, shall be paid over to the county superintendent of the county in which the district school house wherein the tax assessed shall be situated, and shall constitute and be held by the county superintendent as a graded or common district school fund; and the said fund shall be apportioned and distributed by the county superintendent between the white graded common school or white common school district wherein said tax shall be collected and any colored common school district which shall be located over the same boundary; the distribution shall be in the same ratio that the whole number of white children of pupil age and the whole number of colored children of pupil age residing in the district shall bear to the whole number of children, white and colored, residing in the district wherein such tax shall be collected."

This court, construing Section 4101, *supra*, in the case of Harrodsburg Educational District No. 28 v. Trustees of Colored School District No. 1, 105 Ky., 675, held that where a railroad tax was collected from a railroad company, under a levy made by a white school district, it must be apportioned to the white and colored school districts when the boundary of the two districts is the same, in proportion to the pupils in the district. In that case no tax was levied and collected by the colored district at

all, even upon the property of the colored people, and the opinion further holds that there was no provision of the law authorizing a colored school district to levy upon or collect taxes from the property of a railroad company within the district.

In the case of *Hickman College v. Trustees District A, et al.*, 23 R., 1271, taxes were collected from the property of a railroad company by a white common school district in a town of the fifth class, which was not authorized to maintain a graded common school, and it was held that such taxes must be apportioned between such white school district and the colored common school district occupying the same territory. The same was held by this court in the case of *Board of Education of Somerset Public Schools v. Trustees Colored School District No. 1*, 18 R., 103. The counsel for appellant, however, insists that these opinions were rendered previous to the year 1904, and before the enactment of Section 3588a, *supra*, which became a law March 21st, 1904. It is insisted that by reason of the enactment of this law and its providing that a tax raised from the property or poll of any white person or from any corporation shall not be used for the support of a graded free colored common school; and that this statute embraced railroad corporations as well as all other kind of corporations, and for that reason the appellees were not entitled to any portion of the taxes collected from the railroad within the district, and which were sued for.

Section 4101, *supra*, which provides that the taxes collected from railroads or bridges shall be apportioned between the white and colored pupils in the district, was a portion of the statute laws of this State, included in the revision made after the adoption of the present constitution in 1893, and has continued to be a portion of the statute laws of the State ever since.

On March 15th, 1906, subsequent to the enactment of Section 3588a, the General Assembly, in adopting a general law relating to revenue and taxation, included Section 4101 in the statute adopted at that time, in the exact language with which it had been clothed theretofore, and re-enacted it. Sections 4099 and 4100 were re-enacted at the same time, and the one requires the county school superintendent to furnish the railroad companies in his county with the boundaries of the school districts, through which they pass, and the other provides that the

taxes levied against the railroad by any common school district shall be paid to the superintendent of schools. The Sections 4099, 4100, and 4101, *supra*, remain in full force to the present time. This is the latest expression of the legislative will upon that subject, and must necessarily supersede any prior legislative enactments to the extent that any prior enactment is in conflict with it.

It will also be noted that in the statute relating to graded common schools, which is Article 10, Chapter 113, Kentucky Statutes, in providing the sources of revenue for the graded common schools for white persons, it provides that the taxes may be levied for school purposes upon property of every kind and character having value and owned by any white person, company, or corporation.

Section 4487, Kentucky Statutes, provides that the provisions of Article 10, Chapter 113, *supra*, shall apply to such graded common school districts as may be organized by the colored people of the State, and that such districts or graded schools may be organized by them in all cases, the same as the white districts therein provided for may be organized, and that the word "colored" shall be substituted for the word "white" wherever it occurs in the law, so as to make all the sections of Art. 10, Chap. 113, apply to colored schools as well as to white schools, and with equal force. The section, *supra*, further provides that the property of white persons shall not be taxed to maintain any graded common school for colored pupils; nor shall the property of any colored person be taxed for the benefit of any graded common school for white pupils.

This court held, in the case of Board of Education of Somerset v. Trustees Colored District No. 1, *supra*, construing Sections 4101 and 4487, that taxes for school purposes levied upon railroads shall be apportioned between the white and colored schools, where boundaries were the same, and, further, that the stock owned by colored persons in private corporations is liable only to be taxed for the colored schools, and that owned by white persons only for white schools. This opinion was, however, previous to the enactment of Section 3588a. As to the effect of the provisions of Section 3588a, as regards the levying of taxes for school purposes upon corporations other than railroads and bridge companies, is not before us, and we make no determination in re-



gard to same, and, although the appellants, by their answer, allege that the Louisville & Nashville Railroad Company is owned exclusively by white persons, the legislative intent is very clear that taxes levied by a white graded common school district upon the property of a railroad must be apportioned between the white district and the colored school district, if their boundaries are the same. Such taxes should be paid to the county superintendent of schools, and he should apportion them between the districts entitled to them, as provided in Section 4101. In the instant case it appears that the taxes sued for were paid direct to the board of trustees of the graded free white common school, but this cannot affect the liability of such board, as it is liable to the appellees for the proportional part of same to which appellee board is entitled under the law. For these reasons the general demurrer of appellants to the petition of the appellees should have been overruled.

The answer, counter-claim, and set-off present no defenses to the petition, and the complaint of appellants because the court sustained a demurrer to it is not well founded. The answer does not traverse the amounts of the taxes sued for, nor any of the facts necessary to enable the appellants to recover upon the allegations of their petition. The counter-claim plead is, in substance, that appellants employed a truant officer, who did service for the colored school as well as for the white school, and that appellants paid him for his services, and that appellees should bear such a proportion of such sum as the number of colored pupils in the district bears to the whole number of pupil children in both districts. The appellees, as the board of trustees for the colored public school, in the disbursement of the public moneys which come to them are not authorized to expend it for any purposes, except for such purposes as are authorized by the statutes governing their election or appointment, and the duties pertaining to their offices, in the control and management of the school for which they are trustees. The same rule governs the appellants. They are both restricted to such expenditures and for such purposes as the laws require. It is true that the board of education in cities of the fourth class are required to employ a truant officer and to pay him out of the tax levy for such cities for school purposes. This is the board of education provided for in Section 3588, and does not apply

where there is no board of education in cities of the fourth class which have accepted and put into execution the provisions of Section 3588a. An examination of the statutes relating to truant officers fails to disclose any authority for the trustees of a graded free common school for white persons to employ a truant officer to do service for a colored school, and to pay him for his services out of the funds set apart for such a school; neither can anything be found authorizing the trustees of a graded free common school for white persons to employ such an officer to perform services for such a colored school and pay him for his services out of funds belonging to the white school. The trustees of the colored school would have no way to prevent the employment by the trustees of the white school of a truant officer, and would be obliged to acquiesce in such action, but where they had no lawful authority to employ one themselves, and the persons employing the truant officer for them had no authority to do so, it cannot be assumed that they were expecting to pay any portion of the salary for the services rendered by such officer, or that the persons employing such officer were expecting them to do so. The facts have none of the elements necessary to create a legal liability upon the part of appellees.

The judgment below being in accordance with these views, it is, therefore, affirmed.

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### **Taylor v. Fox's Executors, et al.**

(Decided February 17, 1915.)

#### **Appeal from Oldham Circuit Court.**

1. **Trusts—Constructive Trustee.**—Where property is impressed with a trust, and passes to a devisee by will, or to an heir by the laws of descent, or to a purchaser for value with a knowledge of the trust, or to a purchaser without valuable consideration, it is still impressed with the trust, and the devisee, heir, or purchaser is a constructive trustee for the beneficiary.
2. **Trusts—Parol Constructive Trust.**—Where one procures a testator to devise lands to him, upon his promise to hold it for the benefit of another, it creates a parol constructive trust, and may be enforced in equity upon parol testimony.
3. **Trusts—Parol Trust.**—A parol trust in lands will not be enforced, unless it shall be established by clear and undoubted testimony.

where the establishment of the trust will be contradictory to written instruments, and where a rational doubt is left in the mind of the court, as to the acts of the one alleged to have created the trust.

4. **Trusts**—When Equity Will Refuse Relief to Claimant of Trust.—Courts of equity will refuse relief to those claiming the existence of trusts, where the claim is old and stale, and the acts of the parties authorize a presumption unfavorable to its continuance.

A. T. LADD for appellant.

D. H. FRENCH and EDWARDS, OGDEN & PEAK for appellees.

#### OPINION OF THE COURT BY JUDGE HURT—Affirming.

Mildred W. Taylor lived in Oldham County, Kentucky, where she died in March, 1886. She left surviving her as her only heirs-at-law, her sons, John F. Taylor, E. F. Taylor, E. M. Taylor, and her three surviving daughters, Mildred Smith, Jennie Whitesides, and Nannie W. Taylor, and Marcus, Marcia, Lucy, Ryan, Nannie, Mary Samuel, and Alice Blakemore, who were the children of a deceased daughter of Mildred W. Taylor. On the 16th day of February, 1885, she published her last will and testament, in which she first revoked all other wills theretofore made by her, and then devised to each of her heirs above named the sum of \$1.00 each, except to Nannie W. Taylor, to whom she devised all of the rest and residue of her estate, and appointed her executrix of her will, providing in it that she should not be required to give sureties on her bond as executrix, and, further, provided that if she should fail to qualify, that D. H. French be made executor of her will. At the regular May term, 1886, of the Oldham County Court this will was admitted to probate upon the motion of Nannie W. Taylor, and all of the other heirs of Mildred W. Taylor, it seems, were summoned, and its probate was contested by all of her heirs excepting E. M. Taylor. It seems that previous to her death an estrangement had come about in the Taylor family, which grew out of a suit for the settlement of the estate of Mildred W. Taylor's husband, in which the widow, Mildred W. Taylor, and her daughter, Nannie W. Taylor, and her son, E. M. Taylor, were upon one side and the other heirs were upon the other side of the controversy.

A part of the property which was devised by this will to Nannie W. Taylor was a farm consisting of 91 acres, and situated upon the Floyds Fork. Nannie W. Taylor took possession of this farm and exclusively held, controlled, and used it from that time until her death, in the early part of the year, 1902. After the death of Mildred W. Taylor, Nannie W. Taylor married one Fox, who, however, died before she did. E. M. Taylor likewise became married.

On the 16th day of December, 1911, Nannie W. Fox (late Taylor) published her last will and testament, by which she devised to her nephew, Zhale Smith, the Floyds Fork farm of 91 acres, and to her niece, Nannie W. De-Busk, sister of Zhale Smith, all of the rest of her property, a part of which was a farm near LaGrange, in Oldham County. This will was regularly probated and admitted to record in the Oldham County Court at its regular March term, 1912, but it does not appear that any of the heirs of Nannie W. Fox were summoned to appear and answer the motion to probate it.

On the 11th day of March, 1912, Nannie W. Fox, late Taylor, executed and delivered to Zhale Smith a deed, by which she conveyed to him the Floyds Fork farm, expressing in the deed a consideration of "\$1.00 cash, love and affection, and other good and valuable considerations received from the second party."

On the 7th day of October, 1913, the appellant filed his petition in equity in the Oldham Circuit Court, making Zhale Smith and D. H. French, executor of the will of Nannie W. Fox, defendants, in which he plead and claimed that at the time and before the execution and publication of the will of his mother, Mildred W. Taylor, that he and his sister, Nannie W. Fox, and their mother, Mildred W. Taylor, had made a parol agreement that the mother would convey the Floyds Fork farm to Nannie W. Fox upon the condition that Nannie W. Fox should hold it in trust for him, and that he and she should jointly use the farm during their joint lives, and that the survivor should have all of the farm in fee, and in the event he should survive Nannie W. Fox, she would provide for this event by executing to him a deed of conveyance, by which she would convey the farm to him, or she would by will devise it to him to take effect at her death, and further alleging that Nannie W. Fox had failed to perform that agreement by failing in her

lifetime to convey the land to him by deed, or to devise it to him by will, but had wrongfully, and in violation of his rights as *cestui que* trust in the land, had devised it to Zhale Smith, and that her will had been probated without notice to him, and that Smith held the land in trust for him by reason of the agreement, and asking that he be adjudged to be the owner of the land, and that Smith be required to convey it to him.

Thereafter, on the 8th day of October, 1913, the appellant filed an amended petition, in which he alleged that he had learned that the decedent, Nannie W. Fox, had conveyed the land to Zhale Smith by a deed previous to her death, and that this deed was a violation of the contract set up in the petition, and failed to perform the trust assumed by Nannie W. Fox, and by an amended petition filed on January 5th, 1914, the appellant alleged that the making of the deed by Nannie W. Fox to Zhale Smith, and her failure to deed and devise the land to appellant, was done wrongfully and fraudulently; and thereafter he filed another amended petition, in which he alleged, if there was a written paper relating to the Floyds Fork farm, executed by Mildred W. Taylor, that its terms were the same as the parol agreement set up in his petition, and was the same in substance and effect; that he had never had such paper in his possession, and does not know whether or not it exists, and asked the court to require the defendants to produce it in court, if they had such paper.

Thereafter, by another amended petition, the appellant alleged that the deed made by Nannie W. Fox to Zhale Smith on March 11, 1912, was in violation of the trust theretofore mentioned in his pleadings, and that the deed was without any consideration, either good or valuable, and was fraudulently and wrongfully made by Nannie W. Fox, and for that reason was void, and asked that both the deed and will be set aside. A general demurrer of the appellees to the petition as amended, excluding the last amended petition, was sustained by the court, which caused the filing of the last amended petition, but before this amendment the appellees filed separate answers. The answers denied the parol agreement set up and relied upon by the appellant, and the answer of Smith also alleged that the land had been conveyed to him pursuant to a contract which he had theretofore made with the testatrix, Nannie W. Fox, and was

for a good and valuable consideration; that with the knowledge of the appellant he had put valuable and lasting improvements on the land, and that appellant had failed to give him any notice of his claim to the ownership of the land, and that for that reason the appellant was estopped to claim the land or to sue for it. The affirmative allegations in these answers were properly traversed by replies. The evidence of a number of witnesses was taken by depositions upon either side, and the chancellor below, upon a hearing of the case, dismissed the petition of the appellant, to which he excepted, and appealed to this court.

Although the appellee, Smith, alleges in his answer that the deed and will by which he claims title to the land was made by Nannie W. Fox for a good and valuable consideration passing from him to her, and in pursuance of a contract made long theretofore, he fails to state what the consideration was that he paid for the land, or that he paid it without knowledge of the claim of appellant, that the land was held in trust for him, and appellant does not allege that Smith had any knowledge of this alleged trust at any time before the bringing of the suit, but contents himself with denying that the devise or conveyance to Smith was on account of any valuable consideration, and alleging in fact that it was made without any valuable consideration paid by Smith, and was done fraudulently by Nannie W. Fox. Under this state of the pleadings, it seems that the claim of Smith to be a purchaser of the land for a valuable consideration is eliminated as a defense for him, for a purchase by him of the land, if it was then impressed with this trust, and he had knowledge of the trust at the time of his purchase, although his purchase was by a valuable consideration paid by him, he then became himself a constructive trustee for the appellant, and his answer upon that subject was not sufficient to present a valid defense for him, as the mere fact of his being a purchaser for value did not constitute a defense, and if the conveyance or devise to him was voluntary and without valuable consideration, the land would still be impressed with the alleged trust, if it existed in fact.

The Superior Court, in the case of *Rogers' Executor v. Reed*, 14 R., 812, said: "Wherever property which is already impressed with a trust of any kind, expressed or by operation of law, is conveyed or transferred by the

trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then such heir, devisee, or other voluntary transferee, or purchaser with notice, becomes himself a constructive trustee for the original beneficiary." It is, however, proper to say that the evidence does not even remotely indicate that Smith ever had any knowledge that the alleged trust existed.

The question remaining for determination, and upon which a proper decision of the court depends, is: Did Mildred W. Taylor create and impress upon the lands a trust for the benefit of appellant? The issue upon that question is made squarely in the pleadings and upon the proof. The contention of appellee that this case is one coming within the rule laid down in *Speers v. Sewell*, 4 Bush, 239, and in *Rucker v. Abel*, 8 B. M., 566, and other similar cases, is not well made, because in those cases the parties were those to whom parol gifts and sales of lands had been made by the owners of the titles in the lands, and the court held that such attempted gifts and sales were within the statute of frauds, and not enforceable. The contention of the appellant in this case is that his mother, Mildred W. Taylor, was the owner of the land, and designing to devise it to his sister, Nannie W. Fox, and himself jointly, that the sister procured the mother to devise the entire lands to her by promising her mother that he should use it jointly with her during their joint lives, and, in the event she (the daughter) should die before appellant, that she would either convey the entire lands to him by deed, or devise them to him by will, and that by means of such promise to her mother she procured her mother to devise the lands to her, and that she failed to keep this promise and conveyed and devised the lands to appellee, Smith, and he, having received them without any valuable consideration paid for them by him, that Nannie W. Fox held them in trust for him while living and since her conveyance to Smith that Smith held them in trust for him. This was not a parol contract by the owner, Mildred W. Taylor, to transfer the lands to appellant, but the promise came, if made, from Nannie W. Fox to convey the lands to appellant. This court has held in cases of *Caldwell v. Caldwell*, 7 Bush, 515; *Becker v. Neurath*, 149 Ky., 421; and Chap-

man v. Chapman, et al., 152 Ky., 344, that a state of facts similar to those alleged in this case creates a trust, which may be enforced upon parol testimony. In the first mentioned case it is called a latent trust, and in the two last mentioned, a parol constructive trust. The courts of equity, in which such trusts may be enforced, base their action upon the principle that whenever any one obtains the title to property, real or personal, by such means and under such circumstances as would make it unconscionable for such person to hold it and enjoy it, the rules of equity create a constructive trust in the property in favor of the true owner, and it continues impressed with that trust until it goes into the hands of a good faith purchaser without notice. Such trusts usually arise from actual fraudulent conduct in obtaining the title to the property, but they may also arise from conduct which is constructively fraudulent.

As a general rule, if an absolute devise is made, the intention of the testator that the devisee is to hold the property in trust for some one else cannot be shown by evidence other than by the will itself, but an exception is made where a devisee obtains the title to property by a promise to the testator that he will hold it for another, and afterwards refuses to do so, and sets up claim to it himself. 40 Cyc., 1754, 1755.

A parol trust must necessarily be established by parol testimony. In the case of Roche, et al. v. George's Exr., et al., 93 Ky., 609, this court said: "A trust created by parol will be enforced where it is established by certain and undoubted testimony, and such as to leave in the mind of the court no rational doubt as to the act of the testator."

In the case of Northcutt v. Hogan, 4 R., 364, the Superior Court held: "In an action to enforce a parol trust concerning land, or the proceeds thereof, such trust must not only be clearly alleged, but, as against written instruments, must be established by clear and satisfactory testimony."

In the light of the above stated principles of equity, applicable to a case of the character of the one at bar, it seems that the whole matter depends upon a proper consideration of the testimony, and the weight to be given to it. To say the least of it, in many respects, it is very contradictory, and to hold that it establishes a parol trust in accordance with the contention of appel-



lant, or that it does not do so, as appellees contend, leaves in either instance some facts apparently proven, which are very difficult to account for, consistently with the holding. The testatrix, Mildred W. Taylor, is dead, and so is Nannie W. Fox. The appellant and the appellee, Smith, are not offered as witnesses, except the appellant is offered in rebuttal. Very little that either of them might know could be competent evidence. The evidence for appellant is made up almost entirely of declarations and admissions, alleged to have been made by Mildred W. Taylor and Nannie W. Fox. All of this proof, with the exceptions of that made by two witnesses, is by persons who testify to declarations made by these two ladies from twenty-five to thirty years ago in conversation and gossip with their neighbors. Some of these witnesses relate declarations of Mildred W. Taylor, in which she said that she intended to give the Floyds Fork farm to her son, E. M. Taylor, and Nannie W. Fox, or that she desired them to have her property, the longest liver to have it all; and some of them relate declarations by Mildred W. Taylor and Nannie W. Fox to the effect that a writing or will had been executed, and that it provided that whichever, E. M. Taylor or Nannie W. Fox, lived the longer was to have the whole property. One of these witnesses says that Mrs. Fox thought that E. M. Taylor was to have all of the Floyds Fork farm. Another one says that Mrs. Fox said that a will had been made, which was to the effect that she or E. M. Taylor, whichever lived the longer, should have the whole property. Another says that Mrs. Fox said to him that she and E. M. Taylor owned the Floyds Fork farm. It would be exceedingly difficult from all of these declarations, as proven by these witnesses, to sift out the exact interest which either appellant, E. M. Taylor, or Mrs. Fox was to have in the property. It is more consistent with all the facts and circumstances of this case to arrive at the conclusion, that at some time previous to her death, Mildred W. Taylor had contemplated making a disposition of her property in accordance with the truth of these declarations, and probably had made a will to that effect, but before making her last will and testament she had changed her mind and made a different disposition as set forth in her will. It is true that two witnesses, a husband and wife, testified that only a year or two before her death, Mrs. Fox said that an

agreement had been made that appellant was to have the Floyds Fork farm after her death, but these witnesses appear to be very antagonistic to appellee, Smith. The character of evidence offered in this case to support the contention of appellant is of that character which is considered as the weakest known to the law. Pool, et al. v. Thomas, et al., 10 R., 92. Upon the other hand, the will of Mildred W. Taylor gives to the appellant the same that is devised to each of her children, except Mrs. Fox. The devise of all of her property to Mrs. Fox is made by these significant words: "To my daughter, Nannie W. Taylor, who has never left me, and who has always since she was old enough waited on and cared for me with self-sacrificing devotion, I will, give, and etc.,"

\* \* \*

No reason is made or offered why the mother, intending that the appellant should enjoy the use of the property jointly with Mrs. Fox, and that he should have it in fee, if he outlived Mrs. Fox, did not so devise it by the terms of her will, instead of devising it unconditionally to Mrs. Fox. In the case of Caldwell, et al. v. Caldwell, et al., *supra*, the testator devised his son James' portion to his other children in trust for him, because that son was in the Confederate Army, and he feared that because of that fact his property would be forfeited and lost to him. In the case of Rucker v. Neurath, *supra*, the conveyance was made to the wife, in trust for the children by a former wife, in order to provide a reasonable competence for the wife during her lifetime. In Chapman v. Chapman, *supra*, the lands were devised to the father of testator in trust for three grandchildren, in consideration of the father, also, devising all of his property to the three grandchildren.

The appellant contends that under the trust alleged he was to have the joint use of the farm during the joint lives of himself and Mrs. Fox, and if he had this right it was one that he did not have to await her death to enforce, but it seems that he permitted more than twenty-five years to elapse, and until her death, without ever claiming or making any demand to enjoy any interest in the farm, and allowed his claim, to that extent at least, to become stale. While the rights of one arising from an express and continuing trust are not within the statute of limitations, the courts of equity will deny relief upon old and stale claims, where the acts of the

parties authorize a presumption unfavorable to its continuance. *Helm's Exr. v. Rogers*, 81 Ky., 568. Much of the testimony offered by the appellees tends strongly to prove that appellant did not during the lifetime of Mrs. Fox claim any interest in the farm in controversy, and considering all the testimony together it cannot be said that a trust for the benefit of appellant in the farm has been established by such certain and undoubted testimony that it leaves in the mind of the court no rational doubt as to the act of the testator in that regard.

We are, therefore, constrained to the opinion that the chancellor did not err in the judgment below, and it is therefore affirmed.

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### Hogue, et al. v. Gibson.

(Decided February 17, 1915.)

#### Appeal from Pulaski Circuit Court.

1. **Taxation—Tax Sale—Identification of Property.**—To uphold a tax sale there must be a substantial compliance with the statute, and the proceedings must identify the property with reasonable certainty.
2. **Taxation—Tax Sale—Identification of Property—Sufficiency.**—Where property is assessed, sold and reported in the wrong name, and is described as being located in the wrong precinct, a tax sale of such property is invalid.

R. L. POPE and L. G. CAMPBELL for appellants.

O. H. WADDLE & SONS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiff, Joe J. Gibson, brought this action against P. Hogue and others to quiet his title to a tract of land in Pulaski County. Defendants asserted title by virtue of a tax sale made by the auditor's agent on December 20th, 1909. Being of the opinion that the tax sale was invalid, the chancellor adjudged plaintiff the owner of the land, and authorized a recovery by the defendants of the amount of their bid at the tax sale, with interest thereon from the date of payment.

The facts are these:

David H. Helton was the owner of 100 acres of land on the waters of Beaver Creek, in Pulaski County. In the year 1906 plaintiff acquired title to the land in question.

David H. Helton listed the land in the name of Red Helton with the assessor of Pulaski County for State and county taxes for the year 1894, the list showing that the 100 acres were located in Barren Fork Precinct, and that James Helton was the nearest resident. The taxes for that year amounted to \$1.78. On February 18, 1895, the sheriff reported to the clerk of the Pulaski County Court that he had sold the 100-acre tract of land in Barren Fork Precinct, which was listed in the name of Red Helton, for his taxes for the year 1894. The total taxes, together with costs and penalty, amounted to \$2.03. The report was entered by the county clerk in a book kept for that purpose. No further proceedings were had until December 20, 1909, when S. H. Kash, as revenue agent for the State at large, offered said land for sale to the highest bidder. Defendant became the purchaser at the price of \$9.01. When sold the land was described as the property of Red Helton, and as being located in Barren Fork Precinct. As a matter of fact, the land was not located in Barren Fork Precinct, but was located in Beaver Precinct.

The question is: Did defendants acquire a good title by virtue of the tax sale? The statute regulating tax sales provides that the sheriff shall make a report which shall be recorded by the county clerk in a book provided for that purpose. It further provides that when the report is recorded it shall operate as a conveyance and vest the title to the property of all persons *sui juris* in the State, county or district, or either, when purchased by the State, county or district, or either, and shall be constructive notice to the world of the claim existing in favor of the purchaser, whether the State or county or district or an individual, against the lands of persons laboring under no legal disability. Thus it will be seen that the purpose of the statute was to give constructive notice to all intending purchasers of the property. In this case the land was described as belonging to Red Helton (a nickname) instead of David H. Helton, and as being located in Barren Fork Precinct instead of Beaver Precinct. There was a mistake both in the name and in the precinct. Manifestly the report was not no-

tice to an intending purchaser that the lands of David Helton in Beaver Precinct had been sold for taxes. The case does not come within the rule laid down in *Moseley, et al. v. Hamilton, et al.*, 136 Ky., 380, 124 S. W., 894. There the property was assessed in the proper name and was described as being in the proper precinct. Here the property was not only assessed, sold and reported in the wrong name, but in every stage of the proceeding the property was described as being located in the wrong precinct. To uphold a tax sale there must be a substantial compliance with the statute. The proceedings must identify the property with reasonable certainty. Here that certainty is lacking. In the recent case of *Wash v. Noel*, 160 Ky., 847, the property was assessed and listed in the name of C. F. Exum for wife. Kate M. Exum was the owner of the property. It was held that the report of sale in the name of C. F. Exum was not sufficient to put the purchaser on notice that Kate M. Exum's property had been sold, and that the sale was invalid. There is even greater irregularity in this case. There is a mistake both in the name of the owner and in the description of the property sold. We, therefore, conclude that the sale was invalid and that defendants acquired no title thereby.

Judgment affirmed.

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### **Carter Coal Company, et al. v. Collins.**

(Decided February 17, 1915.)

#### **Appeal from Knox Circuit Court.**

**Damages—Settlement—Validity.**—Where in an action for damages for personal injuries defendant pleaded a settlement, evidence examined, and held that plaintiff freely and voluntarily made the settlement at a time when he was mentally capable of contracting, and knew and fully appreciated the effect of the release which he signed, and that the settlement was not obtained by fraud; the court, therefore, should have directed a verdict in favor of the defendants.

**P. D. BLACK and BLACK, BLACK & OWENS** for appellants.

**GOLDEN & LAY** for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

In this action for damages for personal injuries Gillis Collins obtained a verdict and judgment against defendants, Carter Coal Company and Pete Bays, for the sum of \$600. Defendants appeal.

At the time of the accident plaintiff was employed by the company as a slate loader. The company's cars were propelled by an electric motor. The motor was in charge of a motorman and a coupler. One of the coupler's duties was to wind a reel used in propelling the motor. On the occasion of the accident plaintiff claims that the regular coupler had been sent to another part of the mine and he was directed by the foreman to take his place. While on the motor performing the work of the coupler under the foreman's direction, he was caught between the motor and a cross timber and injured.

Several weeks after the accident he made a settlement with the company by which he accepted \$150 in full of his claim for damages. Plaintiff attacked the settlement on the ground of fraud. The validity of the settlement is the only question which we deem it necessary to consider. On this question plaintiff's evidence is as follows:

A few weeks after the injury, and while he was on crutches, Mr. Marsee, a representative of the company, came to plaintiff for the purpose of making a settlement. He first offered plaintiff \$100, and then increased the sum until his final offer was \$150. Plaintiff declined to accept the \$150, but was willing to take \$200. Marsee said: "I believe you are making a mistake in not taking it. I am satisfied that is all we will be out, just attorney fee, and I had rather give it to you than the lawyers; you need it worse than they do, and if you want it, I will give you the \$150.00." He further said that the company had beaten cases as bad as plaintiff's, and even worse. That it might be if the case were tried in the local court plaintiff would get a judgment, but they were not going to allow it to be tried there. They were going to take it to the Federal court. At the same time he showed plaintiff some affidavits and stated that they were going to beat him. In addition to this he stated that he would not give plaintiff any wrong advice if he knew it. He believed the best thing for plaintiff to do

was to take the \$150. At that time plaintiff was in bad shape about getting around, and did not have any money to bear the expense of going to the Federal court. Some time later a notice was served on plaintiff stating that the defendants would, on April 7, 1913, file in the office of the clerk of the Knox Circuit Court a petition and bond for the removal of the case to the United States Court for the Eastern District of Kentucky. After that plaintiff began to think the question over, and concluded from what he had heard Mr. Marsee say, and from the fact that defendants were going to take the case to London, it would be best for him to accept the \$150. After that he went to see his attorney, but did not remember discussing the settlement with him. He never at any time asked for more than \$200. Later on he sent his wife to the company to tell them that he was willing to settle on the basis of \$150. In the meantime, he had not seen Marsee any more in regard to the settlement. He received word from Mr. Luttrell, the superintendent of the coal company, to come to Warren. When he left for Warren he had determined to take \$150. When he came to Warren the release was prepared and signed by him, and the \$150 paid to and accepted by him.

It will be observed that this is not a case where the settlement was made soon after the injury, and plaintiff claims that he was suffering so that he did not have sufficient mental capacity to understand and appreciate the effect of the settlement. It is not a case where it was claimed that the amount paid represented only lost time. It is not a case where any misrepresentations were made to the plaintiff. It is not contended that the affidavits of the workmen who were present were not sworn to by them. Plaintiff's whole case is predicated on the idea that the claim agent represented himself as a friend of plaintiff and advised him to make the settlement, and plaintiff, by reason of these statements, and the further fact that defendants intended to take the case to the Federal court and thus involve an expenditure of money which he did not have. As the coal company was organized under the laws of the State of Delaware, and as plaintiff was a resident of the State of Kentucky, it at least had the right to file a bond and petition for removal to the United States Court on the ground that the controversy was between citizens of different States. An exercise of that right cannot be regarded as a fraud on

plaintiff. Furthermore, plaintiff did not accept the settlement at that time. He waited several weeks. Never at any time did he claim more than \$50 in excess of the amount agreed on in the settlement. It was long after his talk with Marsee that he made up his mind to accept the \$150. Without any further insistence or negotiations on the part of any representatives of the company, he sent his wife to notify the company that he was willing to accept the \$150. He left home and went to the company's office, determined to accept that amount. When he arrived he asked for more, but the company's superintendent declined to give it. Thereupon the release was signed and the money paid to and accepted by him. He was not deceived as to the amount or the purpose for which it was paid. He did not sign the release in ignorance of its conditions. No misrepresentations of any kind were made to him at the time the settlement was made, and the mere fact that several weeks before Marsee advised him as a friend to make the settlement, or stated that they had beaten worse cases than his, or threatened to take the case to the Federal court, is not sufficient evidence of fraud to justify the submission of that question to the jury. Taking plaintiff's own statement, and disregarding, as we must do, all the other evidence bearing on the question of the settlement, he shows conclusively that he freely and voluntarily made the settlement at a time when he was mentally capable of contracting, and knew and fully appreciated the effect of the release which he signed, and that the settlement was not obtained by any fraud on the part of the representatives of the company. There being no evidence that the settlement was obtained by fraud, it follows that the trial court should have directed a verdict in favor of the defendants.

Judgment reversed and cause remanded for new trial consistent with this opinion.

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### **Denker Transfer Company v. Pugh.**

(Decided February 17, 1915.)

Appeal from McCracken Circuit Court.

1. Negligence—Actionable Negligence—Proximate Cause.—In an action by appellee to recover damages for injuries sustained by her



through the negligence of the appellant's agent in putting, or by mistake permitting, her to enter an automobile not owned or controlled by appellant, from which she was thrown by the negligence of the chauffeur; as her evidence conduced to prove that her injuries were received as stated, in either event the jury, if they believed appellee's witnesses, were authorized to find that the negligence of appellant's agent was the proximate cause of her injuries. For the latter's negligence, after selling her a ticket entitling her to ride in an automobile to her home, in putting appellee in the wrong machine, or not informing her of taking the wrong machine, if he knew it, concurring with that of the chauffeur in letting the machine escape, produced the injuries, responsibility for both being upon appellant. It is a well settled rule that the master is liable for injuries of which his servant's negligence is the proximate cause, though the negligence of a third party contributed to cause the injuries.

2. Personal Injuries—Proximate Cause—When Question for Jury.—It is also a well settled rule of law that what is the proximate cause of the injury is ordinarily a question for the jury; and before the court can take it away from the jury and determine it, the facts must be such that fair-minded men ought not to differ about them.
3. Appeal—Verdict—When Must Stand—Flagrantly Against the Evidence—Meaning of.—It is not the province of the Appellate Court to declare what witness or number of witnesses should have been believed by the jury, or in whose favor the evidence as a whole preponderates; nor would the fact that a jury accept the testimony of two witnesses, or even one, as against that of a greater number of opposing witnesses, justify the appellate court in setting aside the verdict on the ground of its being flagrantly against the evidence. To say of the verdict that it is flagrantly against the evidence means that it is palpably against the evidence. The fact that the evidence is conflicting or that the Appellate Court would have made a different finding on the facts, or that in its opinion the verdict is against the weight of the evidence, furnishes no cause for setting it aside; nothing short of its being clearly and palpably against the evidence will give the Appellate Court authority to disturb it on this ground.

BERRY & GRASSHAM and ROSCOE REED for appellant.

J. D. MOCQUOT for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment of the McCracken Circuit Court entered upon a verdict awarding the appellee, Alice Pugh, \$500.00 damages for personal injuries sustained, as alleged, through the negligence of the appellant, Denker Transfer Company, and its servants.

Appellant does not complain that there was error in any ruling of the trial court, nor does it make any objection to the instructions that were given. The sole ground urged for the reversal of the judgment is that the verdict of the jury is flagrantly against the evidence.

The facts, in brief, were as follows: The appellant is a corporation doing business in Paducah as a transfer company, and operates automobiles and hacks for the purpose of transporting passengers and baggage to and from the trains that enter that city. The trains are entered by appellant's agents before their arrival at Paducah, for the purpose of selling tickets to passengers thereon who may desire transportation following the arrival of such trains at Paducah to the hotels or their homes. These tickets when presented at the depot to the servants of appellant who may be found there in charge of their automobiles or hacks entitle the holders thereof to ride in same to their respective destinations in the city. On the 22d day of December, 1913, the appellee, Alice Pugh, together with her husband and child and a young man by the name of James Robertson reached Paducah after twelve o'clock at night on a passenger train from some point south. On this train, before appellee and her party got to Paducah, one John Baker, appellant's agent, sold each member of the party a ticket which entitled them to ride to their respective homes in one of appellant's automobiles, expected to be at the depot in Paducah awaiting the arrival of the train.

The evidence introduced in behalf of appellee conducted to prove that when she and the other members of her party alighted from the train at Paducah appellant's agent, Baker, who had sold them their tickets, conducted them to an automobile which he represented to belong to appellant and which he directed them to enter; that in obedience to these directions from Baker, she, her child and husband and Robertson entered the machine, immediately following which it was cranked up by a third party, who seemed to be in charge of it as chauffeur, but that after so cranking it the latter, for some purpose unknown to the occupants, temporarily left the machine, which, by reason of its engine having been put in motion, by the cranking, ran off, crossing several railroad tracks and finally ran into a ditch, throwing the occupants out. In the fall thus received appellee sustained the injuries complained of.

It is admitted by appellant that its agent Baker sold appellee and the members of her party tickets entitling them to transportation upon its automobiles, but it is appellant's contention, and its evidence conduced to prove, that after the arrival of the train at Paducah Baker approached appellee and her party, pointed out to them an automobile belonging to appellant, in which it was intended that they should ride to their homes, and directed them to enter it for that purpose; that at this time there were several other automobiles standing near that of appellant, among them one belonging to a rival transfer company known as the "147 Taxicab line," but that appellee and her party, instead of getting into the automobile of appellant pointed out to them by Baker, got into one belonging to the rival transfer company mentioned, which car was being operated by one Ray Strickmatter, an employe of the latter company, and that this car ran off and injured appellee.

Appellee testified, in substance, as follows: That upon the arrival of the train at Paducah she and her party were approached by the same man from whom they had purchased appellant's tickets while on the train and that he pointed to the automobile which they entered, saying: "'Right here is your cab,' put us into it, shut the door and hooked up the curtains himself;" that she identified Baker as the person by whom they were thus directed because of having purchased the tickets of him on the train and because of the name on his cap. James Robertson testified to the effect that the man who sold them the tickets on the train had the words "Denker Transfer Co." on his cap, and that this man put appellee and the other members of the party into the cab by which she was injured.

Appellant's agent, John Baker, in giving his testimony, denied that he directed appellee and her party to or put them in the cab in question, but said that upon his leaving the train at Paducah he went to an automobile owned by appellant, which was in charge of Charles Denker, and directed him to reserve it for two men and a lady, meaning appellee and her party; that he then directed appellee, her husband and Robertson to take the machine in charge of Charles Denker and pointed it out to them, but they passed it and took the car in charge of Strickmatter; that they were assisted into the car by Strickmatter and he (Baker) had nothing to do with

their entering the car, nor did he close the door or hook up the curtains. He further testified that after appellee and her party got into the machine Strickmatter cranked it up and then stepped off from it for some purpose, and while he was in that position the car ran off and caused the accident complained of. Although, according to the testimony of Baker, he saw appellee and her party pass appellant's machine, to which he had directed them, and enter that of Strickmatter, he did not go to them, inform them of their mistake or direct them to leave that car and get into that of appellant. Charles Denker in part corroborated Baker, as he testified that upon getting off the train Baker directed him to reserve his car for the use of appellee and her party, but that they passed his car and got into that of Strickmatter.

Strickmatter was also introduced as a witness by appellant, and he testified, in substance, that he was in the employ of the "147 Taxicab Line" at the time appellee was injured and was at the depot with his automobile when the train arrived; that appellee, her husband and child and Robertson came to his car and he placed them in it, put the curtains up and stepped around and cranked the machine, after which he stepped out to look back to see if there was anybody else that could be taken in his car, and that while he was looking for other passengers the car started and ran off over the street car tracks toward the Nashville, Chattanooga & St. Louis tracks, and after going a considerable distance ran into a ditch and thereafter circled back towards the depot; that he ran after it as fast as he could and when it turned back jumped on the running board and stopped it, but before he stopped the car appellee and the other members of her party had been thrown out of it. The witness further testified that he saw appellant's agent Baker at the depot every night, but was unable to recall what he said or did on the night in question, and did not undertake to say that Baker had not pointed out his car to appellee and her party and directed them to enter it. He admitted, however, that he took up, in payment for the transportation he intended to give appellee and her party to their homes, the tickets which they had purchased of Baker, but that when he afterwards presented the tickets to appellant for payment, its manager, Denker, refused to cash them.

It will thus be seen that the evidence was conflicting. According to the testimony of appellee and of Robertson, it was the fault of appellant's agent, Baker, that they entered the wrong automobile. According to the testimony of Baker and Denker, it was appellee's fault that she took the wrong automobile and sustained the injuries complained of. Manifestly the conflicting character of the evidence required the submission of the case to the jury and they were properly allowed to determine whether the facts were as stated by appellee and Robertson or as stated by Baker, Denker and Strickmatter.

It cannot be said that there was no evidence conducing to prove the negligence of appellant's agent, Baker, for if the jury were willing to accept appellee's and Robertson's version of what occurred at the time of receiving her injuries as the truth of the matter, instead of that given by the three witnesses of appellant named, it abundantly authorized the verdict. If, intentionally, or owing to the lateness of the hour and Baker's hurry to start appellee and her party for their homes, he by mistake put them in Strickmatter's automobile, believing it to be the property of appellant, he was guilty of negligence. On the other hand, if, as admitted by him, he saw appellee and her party pass appellant's automobile, to which he had directed them, and enter that of Strickmatter, his failure to go to them, warn them of their mistake and direct them to get out of that machine and enter the one in charge of Charles Denker, also constituted negligence on his part. In either event the negligence of Baker would be the proximate cause of the injuries received by appellee, for his negligence, in directing or putting appellee into the wrong machine, or not informing her of the mistake of taking the wrong machine, if he knew it, concurring with that of Strickmatter in allowing the automobile to escape and run away, produced the injuries, responsibility for the negligence of both being upon appellant. No principle is better settled than that the master is liable for injuries of which his servants' negligence is the proximate cause, though the negligence of a third party contributed to the injury.

Snyder v. Arnold, 122 Ky., 557; Lou. Home Tel. Co. v. Gasper, 123 Ky., 128; Watson v. K. & I. Bridge & Ry. Co., 137 Ky., 619. The cases *supra* also declare it to be the well recognized rule that what is the proximate cause of the injury is ordinarily a question for the jury; and

before the court can take it away from the jury and determine it, the facts must be such that fair-minded men ought not to differ about them. Here the facts were all disputed and the contrariety of evidence marked.

In *L. & N. R. Co. v. Eckman*, 137 Ky., 331, which was an action to recover damages for injuries sustained by the appellee at a railroad crossing, there was a contrariety of evidence as to whether such injuries resulted from the appellant railroad company's negligence or his own, appellant's witnesses greatly outnumbering those of the appellee, but in the opinion we said:

"It is manifest that the court should not have given the peremptory instruction asked by appellant, for the testimony of appellee and Bruehl compelled the submission of the case to the jury; and, if accepted by the jury as the truth of the matter, as was obviously the case, it furnished such evidence of negligence as would support the verdict. It is not the province of this court to declare what witness or number of witnesses should have been believed by the jury, or in whose favor the evidence as a whole preponderates, nor would the fact that a jury accepts the testimony of two witnesses, or even one, as against that of a greater number of opposing witnesses, justify this court in setting aside the verdict on the ground of its being flagrantly against the evidence. Our duty goes no further than to determine whether there was evidence to support the verdict, and our decision of that question is not to be controlled by our opinion as to whether the verdict is in accordance with or against the weight of the evidence."

In *L. & I. Ry. Co. v. Roemmele*, 157 Ky., 84, in holding that the railway company was not entitled to a new trial upon the ground that the verdict was flagrantly against the evidence, we said:

"To say of the verdict that it is flagrantly against the evidence means that it is palpably against the evidence. The fact that the evidence is conflicting or that this court would have made a different finding on the facts, or that in its opinion the verdict is against the weight of the evidence, furnishes no cause for setting it aside; nothing short of its being clearly and palpably against the evidence will give the appellate court authority to disturb it on this ground." *Interstate Coal Co. v. Shelton's Adm'r.*, 160 Ky., 40; *Empire Coal & Mining Co. v. McIntosh*, 82 Ky., 334; *McCoy v. Martin*, 4 Dana, 580;

Chiles v. Jones, 3 B. Mon., 51; Page v. Carter, 8 B. Mon., 192.

Applying to this case the test furnished by the foregoing rule, no one familiar with the weight and effect of evidence can reach the conclusion that the verdict is clearly and palpably against the evidence. This being true, no reason is perceived for disturbing the verdict. The judgment is affirmed.

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**Commonwealth of Kentucky, by Arthur E. Hopkins,  
Revenue Agent, et al. v. Columbia Trust Company.**

**Same v. Same.**

(Decided February 18, 1915.)

**Appeals from Jefferson Circuit Court  
(Chancery Branch, Second Division).**

1. **Taxation—Revenue Agents—Powers of.**—Revenue Agents are officers created by, and their duties and powers prescribed by, the Statute; they cannot exercise any authority unless it be conferred on them by the Statute.
2. **Taxation—Omitted Property—Assessment.**—An action in the name of the Commonwealth upon the relation of an Auditor's Agent, instituted under Section 4260 of the Kentucky Statutes, to retrospectively assess omitted property for taxation, does not abate upon the expiration of the term of the Auditor's Agent; it may be continued by his successor in office, or by the sheriff, or by any other officer authorized by Statute to institute such an action.
3. **Taxation—Revenue Agents—Expiration of Term—Appeal.**—An Auditor's Revenue Agent, whose term expired in January, 1912, is without power to institute an appeal in 1914, from a judgment of the circuit court entered in October, 1912.
4. **Appeal—Parties to Appeal.**—Section 739 of the Civil Code of Practice provides the method of designating the parties to an appeal; and, a party who is not named as appellant in the statement of an appeal, is not before the court as an appellant.
5. **Appeal—Parties to—Briefs.**—The filing of a brief for the Commonwealth, the appellant in the action, by the county attorney, does not make the county attorney a party to the appeal.

**M. J. HOLT, A. S. BULLITT, County Attorney, and J. L. SULLIVAN, Assistant County Attorney, for appellants.**

**TRABUE, DOOLAN & COX for appellees.**

OPINION OF THE COURT BY CHIEF JUSTICE MILLER—  
Dismissing appeals.

These two appeals will be disposed of in one opinion.

The proceedings were begun in the Jefferson County Court in January, 1910, under Section 4260 of the Kentucky Statutes, to retrospectively assess property of the appellee alleged to have been omitted from taxation. They were brought in the name of the "Commonwealth of Kentucky, by Arthur E. Hopkins, Revenue Agent for the State at Large," as plaintiff. They were tried in the county court and dismissed on February 5th, 1912. The plaintiff appealed to the Jefferson Circuit Court on March 15th, 1912, and upon the cases having been called for trial on October 26th, 1912, they were dismissed by the chancellor, on the motions of the defendant, made under Sections 5 and 6 of the Expediting Act of 1912. (Acts 1912, p. 391.)

No appeals were taken in the circuit court to this court; but on October 6th, 1914, an appeal was granted in each case by the clerk of this court to the "Commonwealth of Kentucky, by Arthur E. Hopkins, Revenue Agent for the State at Large."

The statements of appeal endorsed upon the record, pursuant to Section 739 of the Civil Code of Practice, show that the "Commonwealth of Kentucky, by Arthur E. Hopkins, Revenue Agent for the State at Large," is the only appellant in each case.

The appellee in each case has moved to dismiss the appeal for the following reasons: (1) Because the case has not been prosecuted with that diligence required by the Expediting Act of 1912; (2) because Arthur E. Hopkins, who assumes to act as relator herein, has no authority to prosecute these appeals, or to represent the Commonwealth of Kentucky therein; and (3) because the term of said Hopkins as Revenue Agent for the Commonwealth having expired in January, 1912, he now has no official bond and is not entitled to act in any official capacity in these appeals.

Passing the first ground relied upon in support of the motions to dismiss, we will first consider the second ground, which raises the major question of Hopkins' authority to prosecute these appeals.

It is conceded that Hopkins was appointed Revenue Agent for the State at large in January, 1908, for a



term that expired with the term of the Auditor, in January, 1912, pursuant to the provisions of Section 4258 of the Kentucky Statutes.

Section 4260 of the Kentucky Statutes, under which these suits were instituted, provides that if the property sought to be taxed in the proceeding should be held not liable for taxation, the court should make an order to that effect; and that "the officer instituting said proceedings shall be liable on his official bond to the defendant for all costs incurred by him in defending said proceedings, and this shall apply to all courts to which said proceedings are taken."

This provision was repeated *verbatim* in Section 2 of the Expediting Act of 1912. (Acts 1912, p. 395).

When Hopkins filed these appeals on October 6th, 1914, he was not a Revenue Agent for the Commonwealth, and had not occupied that office for nearly three years. The statute above quoted, making the Revenue Agent liable on his official bond to the defendant for costs in case the proceedings to make the supplemental assessment should fail, is necessarily restricted in its application to an officer who occupies the position of Revenue Agent. It cannot apply to the case of a man who claims to be an officer, but who does not occupy that position, and has no official bond behind him.

It is elementary that the liability of a surety on an official bond is limited to acts done or defaults occurring during the term of office of his principal. It was so decided by this court in United States Fidelity & Guaranty Co. v. Faulkner, 144 Ky., 629.

In Mechem on Public Officers, Section 396, it is said:

"Upon the expiration of the officer's term, unless he is authorized by law to hold over, his rights, duties and authority as an officer must *ipso facto* cease."

The Revenue Agent is required to take an oath of office and give an official bond. Kentucky Statutes, Sections 4258, 4259.

Under the foregoing statutory provisions it seems clear that Hopkins' authority to institute these appeals ceased when he ceased to represent the Commonwealth.

That a Revenue Agent, during his term of office, is an officer admits of no doubt. This court expressly so held in Commonwealth v. Central Consumers Co., 122 Ky., 421, where we said:

"Revenue Agents are officers created by and their duties and powers prescribed by the statute, and they cannot exercise any authority not conferred on them by the statute."

See also *Hager v. Lucas*, 120 Ky., 313; *Commonwealth v. Bush*, 131 Ky., 384; *Commonwealth v. Glover*, 132 Ky., 602.

Counsel for Hopkins insists, however, that this court has decided, in effect, that a Revenue Agent may continue to prosecute a case once begun by him, notwithstanding the expiration of his term of office; and in support of that contention he cites *Sebree v. Commonwealth*, 115 Ky., 736; *Lucas v. Commonwealth*, 121 Ky., 423; *Commonwealth v. Bacon*, 126 Ky., 30; and *Commonwealth v. Southern Pacific Co.*, 127 Ky., 358.

A brief examination of these cases will show that they do not have the force attributed to them by counsel for appellant.

*Sebree v. Commonwealth*, *supra*, was brought under Sections 4258-4260 of the Kentucky Statutes, by Sinclair, Auditor's Agent under Auditor Stone. Sinclair filed the usual statutory statement in the Scott County Court Clerk's office, but the clerk failed to issue a summons within five days, as was required by the statute; and this failure by the clerk was relied upon as a defense to the proceedings. It was further urged as a defense that when Auditor Stone's term of office expired the terms of all of the Auditor's Agents in the State, including Sinclair's term, terminated with it, and that Sinclair, therefore, had no right to prosecute the action.

The court rejected both defenses, saying that the statute requiring the clerk to issue the summons in five days was merely directory; and that it did not appear from the record that Sinclair had been removed as Auditor's Agent at the time the proceedings were had in that case. Section 4258 of the Kentucky Statutes, providing that the Auditor's Agent should hold office and be removed at the pleasure of the Auditor was cited; but, on the authority of *Smith v. Coulter*, 115 Ky., 74, the court held that Sinclair, not having been removed by the Auditor, continued to hold office after the expiration of Coulter's term, and until removed by an order or action to that effect.

In the course of the opinion in the *Sebree* case, *supra*, the court said:

"But we do not deem it material to the rights of the parties to this litigation whether Sinclair continued to hold office as Auditor's Agent till the final trial of this case. The Auditor's Agent is not a party to this proceeding, nor is his presence essential. The action is one in the name of the Commonwealth, instituted by, or upon information furnished by or upon motion of, the Auditor's Agent or the sheriff of the county. If he had died after the action had been begun it would not have been necessary to have revived it. His successor in office, or the sheriff, would merely have been authorized to have controlled the proceedings so far as the statute permitted such control; nor could the resignation of the Auditor's Agent have terminated the action. The proceeding is for the State, and on its behalf, and on behalf of the county, to require the listing of property which the taxpayer and taxing officers have omitted."

It will thus be seen that in the Sebre case the court held that Sinclair was entitled to prosecute the suit, it not appearing that he had been removed from office. There is no intimation that Sinclair could have controlled the proceedings after the expiration of his term; on the contrary, it is expressly stated that his successor in office or the sheriff would have been authorized to control future proceedings, in so far as the statute permitted such control.

Hager v. Lucas, 120 Ky., 307, and Lucas v. Commonwealth, 121 Ky., 423, are companion cases, and grew out of the controversy between Auditor Hager and Revenue Agent Lucas, arising under the Act of 1902. In the first case this court held that Lucas, having filed suit in the Henderson County Court, was authorized to prosecute that suit so long as he continued in office. The cases were finally decided by this court in 1905, before Lucas' term of office expired.

Furthermore, the subsequent Act of 1906 expressly preserved Lucas' right to prosecute said suits to a final determination, by providing that any Revenue Agent then in office who should be removed by the Auditor, "should have the right to prosecute to a final determination all actions instituted by him prior to June 15th, 1906."

In Commonwealth v. Bacon, 126 Ky., 30, Bizot, as Revenue Agent, brought a suit against Bacon on April 1st, 1905, while Alexander, as Revenue Agent, brought

a similar suit against Bacon on May 24th, 1905. The Bizot suit proceeded to judgment on May 26th, 1905, and was pleaded as a bar to the Alexander suit. This plea was sustained by the county court, by the circuit court, and by this court. The opinion of this court declared that both proceedings were by the Commonwealth, and, having been initiated by two different Revenue Agents, when the Commonwealth had no right to bring two suits for the same thing, the first was a bar to the second.

We see nothing in this case to intimate that an officer had the right to prosecute an action after he had ceased to be an officer. The most that was said in that opinion was that both suits were brought on behalf of the Commonwealth—a proposition readily conceded, but wholly foreign to the question under discussion.

In *Commonwealth v. Southern Pacific Co.*, 127 Ky., 358, Alexander sued the Southern Pacific Co. in the Jefferson County Court, on February 7th, 1907. He died five days later, on February 12th, 1907. Hardesty, another Revenue Agent for the State at large, and Attorney General Hays, filed an action on March 14th, 1907, to tax the same property, and the court held, in the Hardesty case, that the Alexander suit alone could be prosecuted for the purpose of taxing the property in question.

There was no plea of abatement in the Alexander case, nor any attempt to substitute Alexander's successor in office, or the county attorney, or any one, to act in behalf of the Commonwealth. No such question was raised in Alexander's case. Evidently the Southern Pacific Co. was satisfied to try the question out in the Alexander suit in preference to Hardesty's subsequent suit for the same purpose. The only question ever made as to the abatement of the Alexander suit was made by Attorney General Hays in the Hardesty case. The question was not made in the Alexander suit; it was not made by the Southern Pacific Company in either suit. On the contrary, when the Southern Pacific Company was called upon to answer the Hardesty suit it very naturally and properly pleaded the pendency of the Alexander suit in abatement.

Unquestionably the Alexander suit was pending. It was the Commonwealth's suit; it had not abated by the death of Alexander; it could have been taken up at any time and prosecuted by Alexander's successor in office,

or by any officer having authority to bring actions of this character; and had the point been made in the Alexander case by the defendant, it would have been entirely proper for the court to have required Alexander's successor in office, or some other official as above indicated, to take charge of that action. But the question of the abatement of the Alexander suit was not raised or decided. There was no attempt to show that Hardesty was the successor of Alexander; nor was there any attempt to revive the Alexander suit in Hardesty's name, or to prosecute it in the name of any successor.

These conclusions are made quite clear by the following extract from the opinion of the court, found in 127 Ky., page 363:

"It was not contemplated by Section 4241, Ky. St., 1903, that the taxpayer should be put to the trouble of defending two proceedings for the same thing. See *Riedel v. Commonwealth*, 82 S. W., 635, 26 Ky. L. R., 898. It is conceded by the representatives of the Commonwealth that, if the action instituted by Alexander as Revenue Agent for the State at large was pending after his death and did not abate by his death, then there were two actions in existence against appellee for the same thing. It is clear that the death of Alexander did not abate the suit instituted by him. In the case of *Commonwealth v. Bacon*, 102 S. W., 839, 31 Ky. L. R., 472, this court said: 'The proceeding under Section 4241 is a proceeding by the Commonwealth. The Revenue Agent is only the officer authorized to institute the proceeding. It is the Commonwealth's suit.' To the same effect are the cases of *Hendrick v. Posey*, 45 S. W., 702, 20 Ky. L. R., 359, and *Sebree v. Commonwealth*, 115 Ky., 736, 74 S. W., 716, 25 Ky. L. R., 121. These authorities sustain the proposition that the death of Alexander did not abate the action instituted by him, and it was pending at the time the order of abatement was made in this action. As stated, it is agreed that the same issues were involved and the same relief sought in both, and, as appellee should not be harassed with two actions for the same thing, it was entitled to have one of the actions abated."

The gist of the opinion is that the two suits for the same tax could not be prosecuted by the Commonwealth, and that the last suit should be abated because of the pendency of the first. The question as to how the Alex-

ander suit should proceed, and by whom it should be prosecuted, was neither raised nor decided.

So, it will be seen that in none of the cases relied upon by the appellant did the court decide the question here presented.

It is said, however, that the county attorney has the right to prosecute this appeal; and we have been furnished a brief from the county attorney insisting upon that proposition of law. But since the county attorney has not attempted to make himself the appellant, either by taking an appeal or by asking that he be substituted in Hopkins' place as appellant, it is neither necessary nor proper that we should pass upon his abstract rights in that respect.

For the purposes of this case it is sufficient to say that the county attorney does not make himself an appellant by merely filing a brief. Section 739 of the Civil Code of Practice provides the method of designating the parties to an appeal; and that method has not been followed.

As heretofore stated, the statement of appeal is confined to the "Commonwealth, by Arthur E. Hopkins, Revenue Agent for the State at Large." This statement of appeal brings no other person before the court as an appellant. *Brodie v. Parsons*, 23 Ky. L. R., 832, 64 S. W., 426, and the cases there cited.

Section 4260 of the Kentucky Statutes authorizes the Revenue Agent and the sheriff to bring these actions, and makes the officer who institutes the proceeding liable upon his official bond for the defendant's costs in case the proceeding fails.

In order, therefore, for the court to definitely know which of the several revenue agents of the State may be made liable for the costs, it is proper that he be named as relator in the statement, or petition; and, without a relator so named, the defendant should not, under the present statute, be required to make his defense.

This action was, therefore, properly brought in the name of the Commonwealth by Hopkins, its Revenue Agent, as relator.

But Hopkins was not Revenue Agent when he took these appeals in 1914; his term had expired in January, 1912, and he could not, in the absence of express statutory authority to that effect, thereafter institute any action for the Commonwealth, either by original proceedings under Section 4260, *supra*, or by appeal.

Under the statute heretofore quoted, the appellees will be entitled to recover their costs, in case their property should not be taxed. This they cannot do under this record, since Hopkins' bond is not now effective, and no other officer, with a like or proper bond, has been substituted in his place.

It follows that the motions to dismiss will have to prevail.

Appeals dismissed.

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### **Blair v. Norfolk & Western Railway Company.**

(Decided February 18, 1915.)

#### **Appeal from Boyd Circuit Court.**

1. **Conflict of Laws—Torts—Action in this State to Recover for Injury Received in Another State.**—Where an action is brought in this State to recover for injuries received in another State, the rights and liabilities of the parties depend on the law of that State.
2. **Conflict of Laws—Law of Another State Must Be Pleaded and Proved.**—The law of another State is a fact to be pleaded and proved, and in the absence of pleading and proof it will be presumed that the common law is in force, and that it is the same as the common law prevailing in this jurisdiction.
3. **Conflict of Laws—Pleading.**—Where the trial court refused to allow a pleading to be filed pleading the law of another State, it was error to allow evidence to be introduced on that question.

R. S. DINKLE and WATT M. PRITCHARD for appellant.

J. R. JOHNSON, JR., and HOLT, DUNCAN & HOLT for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.**

In this action for damages for personal injuries by plaintiff, William Blair, against the defendant, Norfolk & Western Railway Company, there was a directed verdict in favor of defendant. Judgment was entered accordingly, and plaintiff appeals.

The facts are these: Plaintiff entered defendant's employ in the month of July, 1909. From that time until the date of the accident, which occurred on March 12, 1910, he was engaged in cutting rivets from steel cars that

had been wrecked on defendant's line. In doing this work one employe would hold the cutter while another employe would strike the cutter with a hammer. Up until about eighteen days before the accident it was customary for a third party to be present and hold a broom over the top of the rivet head so as to prevent those present from being injured by fragments therefrom. According to the evidence for plaintiff defendant's master mechanic, on February 22, 1910, ordered plaintiff and those working with him to discontinue the use of the broom as a protection against flying rivets, and assured them that there was no danger from the rivets. The same witnesses also say that their foreman further informed them that thereafter the broom would not be used. Pursuant to these orders, they discontinued the use of the broom. The master mechanic and foreman deny that any such orders were given. The former claims that upon one occasion he saw plaintiff and other employes pushing the broom in each other's face, and told them if they could not do any better than that they had better go home. After the alleged order to discontinue the use of the broom was given plaintiff continued to work without a broom until the date of the accident. On that occasion he was holding the cutter. A piece from the rivet on which he was working flew off and struck him in the eye. He knew that rivets were liable to fly in any direction.

In his original petition plaintiff based his right of recovery on the failure of the defendant to furnish him reasonably safe tools and appliances, and a reasonably safe place to work, and its additional failure to furnish another employe to hold the shield over the rivet head. In his amended petition plaintiff pleaded that the defendant ordered him and the other employes to discontinue the use of the broom, and assured them that this method of work was safe and free from danger, and that, relying on this assurance, he continued to work without the broom. The defendant introduced several defenses, and on the day the case was set for trial, offered an amended answer pleading, in substance, that the injury occurred in the State of West Virginia, and that under the law of that State plaintiff assumed the risk. The trial court declined to permit the amended answer to be filed. The court, however, did permit the defendant to offer in evidence a decision of the Supreme Court of Ap-



peals of West Virginia, bearing on the question of assumed risk, and at the conclusion of the evidence peremptorily instructed the jury to find for the defendant.

As the injury occurred in West Virginia, the rights and liabilities of the parties depend on the law of that State. *P. C. C. & St. L. Ry. Co. v. Austin*, 141 Ky., 722; *Collins v. Norfolk & Western Ry. Co.*, 152 Ky., 755. The law of another State is a fact to be pleaded and proved. In the absence of pleading and proof it will be presumed that the common law is in force in the other State, and that it is the same as the common law prevailing in this jurisdiction. Where neither party, therefore, pleads and proves the law of the State where the injury occurred, the practical effect is to invoke the common law of this State. *Thacker, by &c., v. Norfolk & Western Ry. Co.*, 162 Ky., 337; *Chesapeake & N. R. Co. v. Venable*, 111 Ky., 41; *L. & N. R. Co. v. Smith*, 135 Ky., 462; *Yellow Poplar Lumber Co. v. Ford*, 141 Ky., 25. In this case plaintiff did not rely on the law of West Virginia. Defendant, however, offered an amended answer pleading the law of assumed risk as applied in that State. For some reason the trial court declined to permit this amended answer to be filed. Notwithstanding this fact, he permitted defendant to prove, over the objection of plaintiff, what the West Virginia law on assumed risk was. After rejecting the amended answer, it was error to hear evidence on the question; for, in the absence of a pleading, plaintiff was not apprised of the fact that the West Virginia law would be relied on, and was, therefore, given no opportunity to introduce evidence on the question. As the evidence was heard by the court, we will not assume that he disregarded the evidence and decided the case under the common law of this State, but rather that he was guided in his conclusions by the evidence which he heard. As this evidence was clearly incompetent, and as the case must be reversed for a new trial under the West Virginia law, we deem it unnecessary to determine whether or not a peremptory under our law would have been proper. On the return of the case the trial court will permit the defendant to plead the law of assumed risk as applied in the State of West Virginia, and will give each of the parties an opportunity to offer evidence on that question.

Judgment reversed and cause remanded for new trial consistent with this opinion.

**Thompson, et al. v. Eversole.**

(Decided February 18, 1915.)

**Appeal from Laurel Circuit Court.**

1. **Contracts—Burden of Proof—When Contract Denied.**—In a suit on a contract alleged to be in writing, the burden of proof is on the plaintiff when the defendant denies the execution and delivery of the contract.
2. **Pleading—Contracts.**—If a party desires to rely on a written contract to support his action he should set it up in his pleading.

O'REAR &amp; WILLIAMS for appellants.

SAM C. HARDIN for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

In October, 1911, Thompson and his wife brought a suit in equity against Eversole, in which they averred that on January 19, 1907, they entered into an executory contract with Eversole, which contract was signed by both of them and accepted by Eversole, under the terms of which they sold and agreed to convey to him the real estate described in the petition for the sum of \$2,500. They further averred that they put him in possession of the property on the day of sale, and were at all times able and willing to convey to him a good title, but that, although he had been in possession of the property from the date of sale, he had not paid any part of the purchase price except \$500. They asked for judgment against him for \$2,500, with interest from January 19, 1907, to be credited by \$500 paid February 11, 1907, and for a lien on the property to secure the payment of the debt.

It might be here observed that the deed tendered by the Thompsons to Eversole showed that the title to a part of the property was in Mrs. Thompson, the title to the other portion being in Thompson.

To this petition Eversole filed an answer in which he denied the purchase of the property for \$2,500 and also the title of the Thompsons, but admitted that he had purchased the property described in the petition under a verbal contract of purchase and subsequent to the verbal contract had paid \$500 of the purchase price. He further averred that at the time he paid the \$500 the Thompsons executed to him a bond for its return in the

event they failed to execute and deliver to him a good deed within a reasonable time thereafter. He also set up the pendency of another suit by him against the Thompsons, in which he sought to recover the \$500 paid, and asked that that action and the one brought against him by the Thompsons be consolidated.

To this answer a reply was filed controverting the affirmative averments, and thereafter it was consolidated with the suit that had been brought in October, 1911, by Eversole to recover the \$500 that he had paid to the Thompsons on the purchase price of the land in question.

This suit by Eversole against the Thompsons was brought on the theory that the Thompsons were unable to make a good deed and had failed to tender one within a reasonable time, and, therefore, Eversole was entitled to recover on the bond executed to him by the Thompsons the \$500 that he had paid on the purchase price.

After the suits were consolidated the Thompsons filed an amended petition in which they asked that if the sale be set aside they should have judgment against Eversole for rent of the property during the time he had it in possession.

The only evidence in the record is the deposition of Eversole and the deposition of Thompson. Eversole said, in substance, that he purchased the property from the Thompsons under a verbal contract, and afterwards, on January 19, 1907, when he paid the \$500, Thompson gave to him the following writing, which was the only writing between them in respect to the property:

"Whereas, Abijah Eversole has this day purchased of me a house and two lots near the depot in London, Ky., being the same lot adjoining upon which I lived in London known as the Dr. Matson lot and the C. M. Randall lot, and whereas, said Eversole has agreed and promised to pay me \$2,500 for said property, \$500 of which is in hand paid, the receipt of which is hereby acknowledged, and the remainder to be paid in six and twelve months in equal installments of \$1,000 cash, and whereas, said H. C. Thompson referred to above as of the first person cannot at this time make a title to said property acceptable to said Eversole, and whereas, said Eversole demands indemnity and security for the \$500 this day paid to said Thompson, and whereas, said Thompson is willing to give said indemnity:

"Now, therefore, this contract agreement and understanding between H. C. Thompson and R. M. Jackson, his security, in consideration of the premises do hereby undertake, obligate and bind themselves that the said H. C. Thompson will, within a reasonable time, execute and deliver and acknowledge a good, sufficient and satisfactory title to said Eversole for said property and all appurtenances with clause of general warranty, and if he fails to do so, then the said Thompson and Jackson hereby agree and promise to pay back to the said Eversole the \$500 this day paid to said Thompson by said Eversole, together with all interests and costs that may attach thereto.

"It is further agreed and understood by the said Thompson and Eversole that the said Thompson turn over to and place said Eversole in immediate possession of said property and all its appurtenances.

"In witness whereof, the said H. C. Thompson and R. M. Jackson have hereunto subscribed their names this the 19th day of January, 1907. (Sgd.) H. C. Thompson, R. M. Jackson."

He further said that Thompson did not tender or offer to tender any deed to him until September, 1911, and that he notified Thompson in November, 1910, that he would not take the property.

Thompson testified that on January 7, 1907, he sold to Eversole the property in question, part of which was owned by himself and part by his wife, and that on that date he gave to Eversole a title bond acknowledged by himself and wife. The title bond, however, is not in the record, and it does not appear what disposition was made of it, as Eversole says he never received it. Thompson further said that on January 19, 1907, when Eversole paid the \$500, he gave him the bond before mentioned. That he did not know until he received the letter from Eversole in 1910 that he would not take the property, the possession of which he had had from the time of the sale in January, 1907, and that Eversole had never demanded a deed from him.

With the record in this condition the court adjudged that Eversole should recover of Thompson \$500, with interest from January 19, 1907. He further charged Eversole with \$486 for rent, subject to a credit of \$235 for repairs, insurance and taxes, leaving a balance due on rent of \$251, which he directed to be credited on the judgment for \$500 as of January 19, 1907.

From this judgment Thompson appeals, insisting that he should have specific performance of the contract he claims to have made with Eversole. Or, in other words, a judgment for \$2,500, and interest, to be credited by \$500.

It will be observed that the title to the property sold to Eversole was in Thompson and his wife. And it will be further noticed that Thompson testifies that he and his wife, on January 7, 1907, executed and delivered to Eversole a title bond for this property, which was acknowledged by his wife, while Eversole denies that he ever received any title bond or any writing except a bond of indemnity. Thus, according to the evidence of Thompson, the purchase and sale was evidenced by a writing, while, according to Eversole, the contract was verbal.

Upon the issue as to whether a title bond was executed, we think the burden of proof was on Thompson and that he failed to make out his case. To enforce specific performance of the contract it was necessary that Thompson should show that a written contract had been entered into, and when this was denied, he assumed the burden of showing the fact of the execution and delivery of the contract. If such a contract had been executed in the manner Thompson states, he should have shown it by the officer who took the acknowledgment of his wife or by other witnesses or circumstances, but his statement that it was executed is not supported by any other evidence or any other circumstances.

It is, however, now insisted in his behalf that the bond given to Eversole on January 19th is a sufficient memorandum of the contract to support the action of Thompson for specific performance.

Without expressing any opinion as to the sufficiency of this writing for the purpose indicated, we think it a sufficient answer to the argument of counsel to say that Thompson did not in his pleading or indeed in his evidence set up this bond as evidencing the contract he had with Eversole. He did not in any manner or form rely on this paper as constituting the contract between them, and this being so, he cannot avail himself in this court of any rights that this bond might have given him. If he wanted to depend on this bond as evidencing the contract, he should have set it up in the lower court as a basis of his cause of action.

Under the circumstances, we think the court adopted the proper method of settling this controversy by treating the contract between the parties as verbal and adjusting their rights on equitable principles.

The judgment is affirmed.

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### **Roberts v. Akers.**

(Decided February 18, 1915.)

#### **Appeal from Floyd Circuit Court.**

**Principal and Agent—The Relation—Estoppel to Deny Agency.—**Where one by want of ordinary care, induces a third person to believe that another is his agent, although such ostensible agent is not so in fact, such one is bound by the acts of the apparent or ostensible agent; liability arises for the acts of such ostensible agent not because he is an agent in fact, but because the principal will not be heard to deny the agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent upon the faith of his apparent and ostensible authority.

**MAY & MAY, F. A. HOPKINS, J. C. HOPKINS and JAMES GOBLE** for appellant.

**B. F. COMBS and SMITH & COMBS** for appellee.

**OPINION OF THE COURT BY JUDGE HANNAH.—Affirming.**

On June 6, 1908, A. J. Roberts and wife conveyed to G. W. Akers a certain tract of land in Floyd County, the deed reciting a consideration of twenty-eight hundred dollars, cash in hand paid, the receipt of which was therein acknowledged.

On August 13, 1913, this suit was filed in the Floyd Circuit Court by Roberts against Akers to recover the sum of twelve hundred and forty dollars, the basis of the suit being a claim that in point of fact only fifteen hundred and sixty dollars of the consideration was actually paid. From a judgment in favor of the defendant the plaintiff appeals.

It appears from the evidence that A. J. Roberts had a son, Charles W. Roberts, who was a traveling salesman, and who was at home only at infrequent intervals.

This son was engaged in the merchandise business near the home of his father, which was on Mud Creek, in Floyd County, the store being conducted by the father, and sometimes by one or two other sons of his.

A. J. Roberts had put into this business for his son, Charles W. Roberts, fifteen hundred dollars, which money he obtained from G. W. Akers, giving him as security therefor a mortgage upon the lands owned by A. J. Roberts.

This merchandise business was not successful, and when Charles W. Roberts came home in June, 1908, he sold it out to Akers. It appears that at the same time Akers proposed also to buy A. J. Roberts' farm, offering therefor \$2,800, the \$1,500 loan and interest to be deducted from the purchase price. This offer was communicated to A. J. Roberts by his son, Charles W. Roberts, and, on advice of the latter, accepted.

Akers and Charles W. Roberts and a notary went to the home of A. J. Roberts on June 6, 1908, where A. J. Roberts signed and acknowledged a deed conveying his land to Akers for the recited consideration of \$2,800 cash in hand paid, the receipt of which was thereby acknowledged. Mrs. Roberts was at the home of her daughter nearby, and Akers, Charles W. Roberts and the notary then went to Mrs. Roberts and she signed and acknowledged the deed.

The next day Akers and Charles W. Roberts made a stated settlement, and Akers paid to Roberts, in the course of that settlement, the balance due on the purchase price of A. J. Roberts' farm. Charles W. Roberts was largely indebted for the merchandise sold by him to Akers, and it seems that it required the proceeds not only of the merchandise, but also the balance of the purchase money on his father's farm to settle his indebtedness. At least, he received the money from Akers, and admits that he did not pay it over to his father.

Immediately after effecting this settlement with Akers he left on a trip, from which he did not return until about six months thereafter. He says that when he did return his father requested a settlement of him, but that he was then and is yet unable to pay him the \$1,240.

In the sale by A. J. Roberts to Akers it was agreed that possession was to be given January 1, 1909. About that time Charles W. Roberts returned home; and he

rented the house, garden and a field from Akers, for the occupancy of his father during 1910; Akers used the remainder of the farm himself. A like arrangement was effected for the year 1910, Charles W. Roberts paying rental for both years. He says in testifying that this was a temporary expedient until he could get in position to make a settlement, and was done to reconcile his father, who was demanding a settlement of him.

On January 12, 1911, Charles W. Roberts bought the farm of Akers, and received a conveyance therefor. The consideration was to be \$3,400, one-half to be paid in twelve months and the remaining half in two years. Charles W. Roberts then built a house on the place, his father continuing in the occupancy thereof.

On August 6, 1913, being unable to make any payments on it, he reconveyed the farm to Akers; and one week later this suit was instituted.

Akers testified that several weeks after the deed was executed he returned to A. J. Roberts the mortgage which he held as security for the loan of fifteen hundred dollars, and that nothing was then said about the balance of the purchase money; that a short time before January 1, 1909, the day on which he was to give possession, Roberts spoke to him about renting the place, and that when he, Akers, named the price, Roberts said it was too much, and that he would move off when he got the balance of his money; that this is the first time A. J. Roberts ever mentioned the matter to him.

Without rehearsing the testimony in detail, we may say that A. J. Roberts looked to his son, Charles W. Roberts, for the money rather than to Akers; and that he continued to do so for more than five years before bringing this action.

A. J. Roberts executed and acknowledged the deed in question, reciting a fully paid and receipted consideration, and permitted his son, Charles W. Roberts, to take it into his possession, without one word to Akers by way of suggestion or warning concerning any limitations which there might be upon the power of his son to act in the matter of receiving the balance of the consideration; and it seems to us that this state of facts calls for the application of the well-established rule that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must bear the burden thereof.



It may be conceded that direct proof of an actual agency upon the part of Charles W. Roberts to receive the balance of the purchase money for his father's farm is here lacking.

But, where one by want of ordinary care induces third persons to believe that another is his agent, empowered to perform certain acts, although such ostensible agent is not an agent in fact, such one is bound by the acts of the apparent or ostensible agent. Liability arises for the acts of such ostensible agent, not because he is in point of fact an agent, but because the principal will not be permitted to deny it, to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent upon the faith of his apparent and ostensible authority. See 7 A. S. R., 138; 13 A. S. R., 101; 97 A. S. R., 264; 30 A. S. R., 353; 31 Cyc., 1235.

This, of course, is merely making a specific application, in the law of principal and agent, of the rule that where one of two innocent persons must suffer by the act of a third, the loss should fall upon him whose want of care has made it possible.

Judgment affirmed.

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## **Louisville & Nashville Railroad Company v. Winkler.**

(Decided February 18, 1915.)

### **Appeal from Bullitt Circuit Court.**

1. **Railroads—Action for Personal Injuries—Negligence.**—Where a conductor on a freight train was injured while in the performance of his duties through the negligence of a brakeman, who, in the absence of the conductor, coupled onto the train a car with a defective draw-head, the negligence of the brakeman was not attributable to the conductor, although the conductor was superior in authority to the brakeman.
2. **Railroads—Employers' Liability Act.**—Where there is evidence conducing to support the averments of the petition constituting ground of action relied on for recovery, although the weight of the evidence, both numerically and in probative value, may be with the defendant, the evidence is sufficient to sustain the verdict of the jury, although the case is laid and practiced under the Federal Employers' Liability Act.
3. **Railroads—Contributory Negligence—Inspection.**—Where the conductor in the line of his duty was elsewhere engaged, it can not be said that he was guilty of contributory negligence in not being

present at the time a defective car was coupled onto the train, or in not personally inspecting the car before it was coupled.

4. **Trial—Employers' Liability Act.**—In cases tried in the State courts under the Federal Employers' Liability Act, three-fourths or more of the jury may return a verdict.
5. **Personal Injuries—Action for—Verdict.**—Where one was suffering the consequences of an injury received five years before, but not to the extent of incapacitating him from service or lessening his power to earn money, and he received another injury from his master's negligence, which permanently and greatly aggravated the consequences of the first injury, and wholly incapacitated him from service, rendering him dull and stupid, impairing his powers of speech and faculties of sight, hearing, and feeling, incurred medical expense of \$100, and lost \$400 in time, a verdict of \$2,500 is not excessive.
6. **Contracts—Evidence—Submission to Jury.**—Evidence examined and held to warrant submission to the jury whether at the time the injured party signed a contract in settlement of damages he was mentally capable of understanding his rights and making a contract concerning them, or whether the contract was procured by fraud or misrepresentation.

CHAS. H. MOORMAN, CHAS. CARROLL and BENJAMIN D. WARFIELD for appellant.

C. P. BRADBURY and S. L. TRUSTY for appellee.

#### OPINION OF THE COURT BY JUDGE NUNN—Affirming.

In this action the appellee recovered \$2,500 damages for personal injuries he received in an accident on a freight train upon which he was serving appellant in the capacity of conductor. The accident happened on the night of January 3rd, 1913, at what is called Crooked Hill, on the Knoxville branch of appellant's road, near East Burnstadt, in Laurel County. The action was brought under the Federal Employers' Liability Act.

Appellant defended on the ground that Winkler's injury was due solely to his own negligence. In another paragraph it plead that he was contributorily negligent, and by an amended answer it plead accord and satisfaction.

Appellant asks for a reversal because, (1) Winkler failed to prove that the accident in which he claims to have been injured was due to defendant's negligence; (2) under the Federal Employers' Liability Act, it was plaintiff's duty to sustain his case by a preponderance of the evidence, and a mere scintilla of evidence is not sufficient; (3) on the same authority a unanimous ver-

dict of the jury is required, instead of a majority verdict as was rendered in this case; (4) the damages were excessive; (5) the evidence overwhelmingly showed that Winkler possessed contractual capacity, and that it was the duty of the court to instruct the jury as a matter of law that Winkler could not recover in the face of his contract executed in settlement of the liability; and (6) error in instructions.

A statement of the facts will be necessary for a consideration of the questions raised. The accident happened about midnight; the train was a double-header composed of 68 freight cars. Fifteen or twenty minutes before the accident the train had stopped at Copley, near the foot of Crooked Hill, and took up one or more cars. One of these, an L. & N. ballast car, was put in immediately behind the engine, so that it had the load of the whole train to carry. While they were switching at Copley, and these cars were being added to it, Winkler was at the rear end of the train in the caboose seated at a desk working on his books or reports. This ballast car was coupled onto the engine by a brakeman. It is admitted that Winkler was superior in authority to the brakeman, and that his general duties included inspection of his train and cars. It is also conceded that it was the duty of the brakeman to make the same inspections, and particularly of cars coming directly under his observation as in this case. The brakeman says that at the time he made the coupling the draw-head on the ballast car was dropped down about an inch, that is, out of plumb. He admits, and no one disputes, that this was some indication of a defect in the fastening of the coupler, or draw-bar to the car. He did not look under the car or make any examination of the fastenings as he should have done in view of the steep hill the train was about to climb, and the heavy train this car had to carry. In about fifteen minutes after the car was coupled on, and while the train was climbing Crooked Hill, and while Winkler was still seated and at work in the caboose, this draw-head pulled out, with the result that the brakes were instantly set on the train, and the sudden stop pitched Winkler forward about ten feet and his head struck the water cooler in the forward end of the car. A gash was cut to the bone on the right side of his head, and he suffered other injuries which at the time he thought were of a minor

nature. Recovering himself, he went to the front of the train and found that the draw-head had pulled out of this ballast car, and saw it laying there on the track. In describing the condition as he saw it, he says: "It was the draw-bar and the old draft timbers pulled out with the draw-bar. \* \* \* It looked like the draft-bolts had split out through the car. \* \* \* It was a kind of an old split where it pulled out." This evidence as to the condition of the timber and the old split and bolts pulling out is not denied. Neither is there any denial of the fact that at the time the car was coupled the draw-bar was hanging down at least an inch out of alignment. There is difference of opinion among the witnesses as to whether the hanging down of the draw-bar indicated that its fastenings to the car were dangerous. But the proof amounts to more than a scintilla, and is sufficient, in our opinion, to warrant a submission of the case to the jury on the proposition as to whether the railroad company negligently failed to perform the duty of exercising ordinary care to have and keep the draw-bar and those attachments and fastenings under the car in a condition reasonably safe and sufficient for use in the train in question.

Appellant says that a mere scintilla of evidence is not sufficient to sustain a case under the Federal Employers' Liability Act. It contends that the court should have instructed the jury that they could not find for the plaintiff unless they believed from a preponderance of the evidence that his theory of the case, as averred in the petition, is true.

In the recent case of *L. & N. v. Johnson's Admr.*, 161 Ky., 836, this question was disposed of adversely to appellant's contention in the following language:

"If the evidence in a case heard and determined under this act would be sufficient to take the case to the jury and support the verdict if the suit had been brought under the State law, it would be sufficient to take the case to the jury and support the verdict if it was brought under the Federal Act. And it is the well settled practice in common law actions in this State that the case should go to the jury if there is evidence conducing to support the averments of the petition constituting the grounds of action relied on for recovery, although the weight of the evidence, both numerically and in probative value, may be with the defendant."

On the question of contributory negligence the court properly instructed the jury under the Federal Employers' Liability Act, that "It goes by way of diminution of damages, if any, in proportion to his negligence as compared with the combined negligence, if any, of the plaintiff and the defendant, if any."

It is not contended that appellant was guilty of any negligence in the way of unusual or unnecessary jerks or any improper operation of the engine. The only negligence attempted to be shown on the part of the appellant was as to the alleged defective condition of the draw-bar and its fastenings. As we have already indicated, the proof in this regard was undisputed and it was sufficient to take the case to the jury.

The only pretense that the appellee Winkler was guilty of contributory negligence arises from the fact that he was conductor of the train and was superior to the brakeman who coupled this defective car onto the train, and having general charge of the train and employes, it was primarily his duty to inspect the car, and having failed in this, appellant contends it was contributory negligence, or rather that his was the only negligence shown.

To prevent a recovery under the Federal law, the injury must have been due solely to appellee's negligence. Contributory negligence does not defeat, it only diminishes the amount of recovery. But we are unable to see that appellee was guilty of any negligence. At the time of the accident he was personally engaged in the performance of his duties. It was the special duty of the brakeman under the circumstances to examine the defective draw-bar. The conductor at the time was no more chargeable with dereliction on the part of the brakeman than he would have been for the engineer or any other employe. While they were in a measure subject to his control, yet it was not his duty—it was impossible for him to personally supervise each of them as they performed their multitude of duties.

The case of *L. & N. v. Heinig's Admr.*, 162 Ky., 14, was to recover damages under the Federal law for the death of a railroad engineer resulting from collision. It was primarily the duty of the engineer to observe train orders placed in his hands and keep a lookout to avoid collisions. It was also the duty of the conductor under certain conditions to apply the angle-cock and stop the

train. It was held that where the conductor failed to perform his duty, there might be a recovery for the engineer's death, although his negligence created the condition which caused his death.

Appellant says that under the Federal law a unanimous verdict is required. This question was disposed of adversely to appellant's position in overruling a petition for rehearing in the case of C. & O. v. Kelly's Admr., 161 Ky., 655, where it was held that in cases brought in the State courts under the Federal Employers' Liability Act, three-fourths or more of the jury may return the verdict as provided in Section 2268 of the Kentucky Statutes.

It is next contended that the damages are excessive. This contention grows out of the fact that before this injury appellant was suffering serious consequences from an accident which happened to him about five years before. The cause of the accident is not explained, but it appears that he received a blow on the left side of his head, and appellee admits that he had had one spell of epilepsy apparently traceable to it. Other witnesses testify to having seen him have as many as a dozen epileptic fits during the five years preceding, but the evidence shows that they were not frequent and of short duration, and, with perhaps one exception, there was no interference with the performance of his duties as conductor. In the injury complained of he received a depressed fracture of the skull on the right side of his head. From January 3rd, the time of the accident, to January 26th, when he returned to work, he was under the care of a physician most of the time, and from then until October he worked most of the time. He then had to give up his work entirely because of the increasing frequency and severity of the epilepsy. Medical testimony shows that after this last injury each spell would affect him for several days. That he became extremely nervous; lost weight; that he had a twitching and jerking of the muscles in his face and jaws, an impediment in his speech; and the neck muscles had a certain amount of paralysis—numbness; that his sight and hearing were impaired, and that his mentality had become very weak. One of the physicians examined him a few months before the accident and again in December following—about the time of the trial. He attributed the origin of his epilepsy to the old injury on the left side of his head.

But he said that the last injury on his right side had greatly accentuated the trouble. He said the first injury did not affect his sight and hearing or nervous system, although it left him with a numbness in the neck muscles of the left side. He attributed his present enfeebled condition mentally and physically, and the defect in sight, hearing and speech, to the last injury. In fact, the physician said that Winkler had become so stupid as to render impractical some of the tests which he desired to subject him to in the examination last made. In addition to this, the proof showed that he lost time of the value of \$400 and incurred \$100 medical expense. Under this testimony we are unwilling to say that the verdict was excessive.

The appellant pleads satisfaction of the liability by a receipt which Winkler signed on March 10th, acknowledging payment of \$75 by the appellant, "in full compromise, settlement and adjustment of all claims and demands on account of injury to the person, including those which may hereafter develop, as well as those now apparent, and damage to and loss of property sustained by him at or near East Burnstadt, Kentucky, on the 3rd day of January, 1913, while a freight conductor on said company's railroad and on every other account whatsoever." The receipt further stipulates that it is understood that this settlement is not based upon any promise of future employment nor is it paid in settlement of any claim for lost time or wages.

Winkler claims that he was mentally incompetent at the time to make a contract or to understand his rights with reference to the injury. He says that while in that condition an agent of appellant represented to him that they would pay him his wages for lost time to the amount of \$75 and that he agreed to take it if the company would send it to him. He denies any knowledge of ever signing a contract, but admits he received the \$75. He says that if he did sign a contract of settlement it was by mistake and fraud practiced upon him by the defendant.

The court gave to the jury this instruction:

"If the jury believe from the evidence that the paper relied on by defendant as a release was signed and executed by both plaintiff and defendant with the mutual understanding that it was for time lost by plaintiff from his injury to that date and that the plaintiff executed the release by mistake or by fraud of the defendant, and

that when plaintiff executed the release he was mentally incapable of understanding same, you will disregard said paper, but unless the jury so believe, the law is for the defendant."

It will be noted that by this instruction the jury must find three things concurring, viz., mutual understanding that the payment was for lost time; and that he was induced to execute the release by mistake or fraud; and that he was mentally incapable of understanding the same. This instruction was too favorable to appellant, for the contract was invalid if it was procured by fraud or if the appellee was mentally incapable of understanding it. *New Bell Jellico Coal Company v. Oxendine*, 155 Ky., 840.

But appellant argues that notwithstanding the expert opinion evidence, and which it insists should be disregarded, the facts are conclusive that he did understand his rights, and knew what he was doing when he signed the release, and that, in fact, he, by conversation and correspondence, negotiated the settlement. It introduces two letters written by appellee which on their face indicate that they were composed by a man of at least average intelligence, and appellee admits that he wrote them. He says, however, that they were written at the instance and practical dictation of appellant's agent, who effected the settlement and in order that the agent might have something to present to his superiors in his effort to get payment for the time lost.

Appellee shows that \$75 is about the amount he would have earned between January 3rd and January 26th, when he returned to work. He does not deny signing the release—he says he has no knowledge of it. It is signed "J. A. Winkler," and he says he never signs his name that way. He introduces witnesses to prove that on the 10th of March, the date of the release, he was at his home town, and that he was found wandering about in the upstairs room of a relative's house. His wife's grandmother lived there and it was not unusual for him to go to see her. On inquiry by the people of the house he said that he was there to see her, but the witnesses say that she was never known to be upstairs and she was not that day. They say that he had no mind at all, and was not competent to transact any business. The doctor who examined him at the trial gives it as his opinion that he was not mentally competent to



transact business and had not been since the second injury. There is room for difference of opinion as to Winkler's mental capacity from the facts given in evidence, but it was the peculiar province of the jury to pass upon these facts.

On the whole case, we think the judgment should be affirmed, and it is so ordered.



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2. Authority of Legislature to Enact a General Law for the Alteration of the Liquor Laws.—Section 61 of the Constitution authorizes the Legislature to enact a law, whereby the sense of the people of any county, city, town, district, or precinct may be taken as to whether or not spirituous, vinous or malt liquors may be sold, bartered, or loaned therein or the sale thereof regulated. *Id.*..... 118
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4. Section 51 of Constitution.—No provision of a statute directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of Section 51 of the Constitution, which provides that no law enacted by the General Assembly shall relate to more than one subject, which shall be expressed in the title. *Id.*..... 787

CONSTRUCTION—See Deeds; Mortgages; Statutes; Wills.

CONSTRUCTIVE SERVICE—See Judgment.

CONSTRUCTIVE TRUSTS—See Trusts.

## CONTEMPT—

1. What Will Constitute.—Such acts or conduct as will amount to disrespect of or indignity to the judge or court, or interference with or disobedience of the processes, orders or judgment of a court, or some obstruction of the due and proper

## CONTEMPT—Continued—

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- administration of justice in a pending case, or some misconduct of an officer of a court, will constitute contempt of court. *Brannon v. Commonwealth*..... 350
2. Assault and Battery Upon a Witness—When a Contempt of Court.—If a defendant criminally prosecuted, commits an assault and battery upon a witness for the Commonwealth, either as a punishment for having testified against him under an indictment then pending, or to prevent his testifying against him in a future trial under an indictment then pending, such assault and battery will constitute a contempt of court, for which the court in which the indictments were pending has the power to proceed against him by rule and summarily try and punish him. And if, in the judgment of the court, its power as such is inadequate to the infliction of such punishment as the contempt deserved, it has the right to submit the matter to the determination of a jury. *Id.*..... 350
3. Punishment—When Not Excessive.—Evidence examined and held sufficient to show that the punishment, consisting of a \$1,000.00 fine and six months' imprisonment in jail, inflicted by the verdict in this case, is not excessive. *Id.*..... 350

CONTEST—See Intoxicating Liquors; Wills.

CONTINGENT REMAINDERS—See Wills.

CONTINUANCE—See Criminal Law.

CONTRACTS—See Business; Carriers; Counties; Insurance; Landlord and Tenant; Mechanics' Liens; Mortgages; Pleading; Sales; Statute of Frauds—

1. Rescission.—The ground upon which courts of equity proceed in rescinding or cancelling executed contracts is more narrow, and is to be more carefully trodden than that upon which they refuse specific performance or even decree executory contracts to cancellation; nothing but fraud or palpable mistake will justify the rescinding of an executed contract. *Bewley v. Moreman*..... 32
2. Rescission—Actionable Fraud—What Constitutes.—To establish actionable fraud it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time, or previously existing, and not a mere promise for the future; it must be relied upon by the person whose action is intended to be influenced; and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. *Id.*..... 32
3. Acceptance.—Where one in writing qualifiedly accepts a proposition for contract and subsequent conduct of the parties shows that both observed the contract as qualified, then

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- there is such an acceptance by each as to make it an express contract. *Hayes v. Nic Adamo Co.*..... 223
4. Sale of Standing Trees—Statute of Frauds.—Under Sub-section 13, Section 1409, Kentucky Statutes, no contract for the sale of standing trees shall be enforceable unless the same or some memorandum thereof is in writing, signed by the parties. *Burris v. Stepp*..... 269
5. Sale of Standing Trees—Brands.—Sub-section 14 of the same section does not limit application of Sub-section 13. Under this section, when the written contract is executory and the trees contracted are branded by the owner, or with his consent, then the sale has the same force as a recorded sale of land. *Id.* ..... 269
6. Contemplating Personal Supervision or Service of One Party—Rights of Parties.—Where a contract provides, and it is the intention of the parties, that one of them shall render personal service or give personal supervision to the business created by the contract, the other party is entitled to this personal service or supervision and cannot be compelled to renew the contract when the other party has put it out of his power to give the attention or supervision contemplated by the contract, although the contract may in terms provide for its renewal after the expiration of a time fixed in the contract. *Fritts v. Swiss Cleaners & Dyers*..... 277
7. Sale of Personal Property—Intention of Parties.—In a contract for the sale of personal property, the intention of the parties controls, as to whether the title passes or does not pass, regardless of all other circumstances of the transaction. *Frazier Co. v. Owensboro Stave & Barrel Co.*..... 301
8. Sale of Personal Property—Title.—Before the title to personal property passes from the vendor to the vendee, the price must be agreed upon, or some method agreed upon by which the total price can be definitely ascertained. *Id.*..... 301
9. Sale of Personal Property—Inspection.—Where property, such as staves, is shipped by a common carrier from a distant point to a purchaser, and he has had no opportunity for inspection, he has a right to inspect the property before receiving it, to determine whether it is in accordance with the contract or not, and if not in accordance with the contract, to reject it, unless it appears from the contract that it was intended for the title to it to pass to the purchaser without inspection. *Id.*..... 301
10. Intention of Parties—How Determined.—In determining what was the intention of the parties in a contract for the sale of personal property, the court should look to all of the facts and circumstances, and the customs of the trade in such commodity. *Id.* ..... 301



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11. Sale of Timber—Action to Enforce.—Where a contract for the sale of certain trees provided that they were to be inspected and branded by the purchaser's agents, the fact that such agents inspected and branded a greater number of trees than the contract called for imposed no liability on the purchaser other than that called for by the contract. *Ellswick v. Yellow Poplar Lumber Co.*..... 450
12. Sale of Timber—Finding of Chancellor—Evidence.—Evidence held to sustain the finding of the chancellor fixing the number of trees covered by a contract for the sale of timber. *Id.*.... 451
13. Certainty—Specific Performance—Evidence.—Where a contract for the sale of certain trees provided that payment therefor was to be made upon inspection and branding of the trees by the purchaser's agents, and the delivery of a warranty deed conveying certain rights and privileges in connection with the removal of the timber, evidence examined, and held that, the number of trees embraced in the contract being accurately fixed, the chancellor did not err in decreeing specific performance of the terms of the contract. *Id.*..... 451
14. Parol Contract—Services.—In an action under an express parol contract for domestic services, where the only issue is not whether there was a contract or no contract, but what was the real rate of compensation agreed upon by the parties, evidence of the real value of the services rendered and of the customary price of similar services at the time and place of the contract, may be introduced; not for the purpose of varying the contract between the parties, but solely for the purpose of aiding the jury in determining what was the real rate of compensation agreed upon. *Edelen v. Herman, By, &c.*..... 500
15. Compromise—Consideration.—A compromise of matters of controversy in relation to property, when both parties understand the facts, is a valid consideration for the making of a contract, and a court will not go behind such settlement to determine which party was right in the controversy, and will enforce the contract founded upon the settlement, if it is free from fraud and illegality. *Hughes v. Hughes*..... 505
16. Compromise—Rescission.—A party to a contract which compromises matters of controversy between him and another, if the compromise was fairly made, will not be allowed afterwards to have it set aside, or the contract rescinded, because he finds out that he could have obtained a more favorable settlement in the courts than he did under the compromise contract. *Id.* ..... 505
17. The early rule was that any contract which tended to restrain trade was void; but the rigor of that rule has long since been relaxed, so that contracts in reasonable restraint of trade are now recognized as valid. *Nickell v. Johnson*..... 521

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18. Restraint of Trade.—A contract in restraint of trade will be enforced only when the restraint is no more extensive than is reasonably required to protect the interest of the party in whose favor it is given, and is not so large as to interfere with the interest of the public. *Id.*..... 521
19. Sale of Business—Agreement Not to Engage in Business.—A contract by which the defendant sold his stage line business to the plaintiffs for a valuable consideration, and agreed not to again engage in that business between the points covered by his former stage line, and not to compete with the plaintiffs in said business, is a valid contract, and will be enforced by injunction proceedings against the defendant. *Id.*..... 521
20. Settlement of Accounts—Implied Acceptance.—Where an agent is authorized by his principal to prepare a contract of settlement between the principal and a third party, and the contract is prepared and executed by the third party and returned to the agent, and the principal notifies the agent that he will not accept the contract because certain notes and checks were not returned by the third party, but this fact is never communicated to the third party, and the contract is retained by the agent for several weeks, during which time the property involved in the settlement is sold, and the third party is in no position to protect his rights, the principal is estopped to question the acceptance of the contract. *Stallings v. Carpenter* ..... 711
21. Settlement—Evidence.—The terms of a written contract, and the circumstances under which it was executed, considered, and held that the contract was a complete settlement of the accounts between the parties thereto. *Id.*..... 711
22. Sale and Delivery of Tobacco.—In a contract for sale and delivery of tobacco, after it was stripped, where the place of delivery was changed by subsequent agreement from Madison, Ind., to Carrollton, Ky., the fact that the purchaser later told them not to deliver it at Carrollton, did not justify the seller in secretly delivering to Carrollton and selling to other parties. *Schirmer & Co. v. Myers*..... 760
23. Delivery of Tobacco.—It was their duty to deliver at Carrollton, and offer it to the purchaser in a reasonable time after stripping. *Id.* ..... 760
24. Sale and Delivery of Tobacco.—The purchaser did not abandon the contract or release the seller by asking for another change in the place of delivery, and if the seller failed to deliver according to contract, he is liable in damages to the purchaser. *Id.* ..... 760
25. Contracts—Contract for Support of Child.—Uncertainty.—A contract between the putative father and the mother of a child that the father would support, maintain and educate the child and that before he died he would make such provisions

**CONTRACTS—Continued—****Page**

- out of his estate as would make the child equal with his other children, is not void for uncertainty. *Lewis v. Creech's Admr...* 763
26. Prohibited by Statute Not Enforcible.—An individual partnership doing business under an assumed name, without complying with the requirements of Section 199b of the Kentucky Statutes, which provides that no persons shall carry on or transact any business under an assumed name or name other than the real name of the individuals conducting the business, unless they shall file a certificate setting forth the names of the parties and also the assumed name, and which fixes a penalty for violation of the statute, could not recover on a contract when the statute was interposed as a defense, although the defendant had received and retained property under the contract. *Hunter, et al. v. Big Four Automobile Co.* ..... 778
27. Burden of Proof—When Contract Denied.—In a suit on a contract alleged to be in writing, the burden of proof is on the plaintiff, when the defendant denies the execution and delivery of the contract. *Thompson, et al. v. Eversole*..... 836
28. Evidence—Submission to Jury.—Evidence examined and held to warrant submission to the jury whether at the time the injured party signed a contract in settlement of damages he was mentally capable of understanding his rights and making a contract concerning them, or whether the contract was procured by fraud or misrepresentation. *L. & N. R. Co. v. Winkler* .. 844

**CONTRACTORS—See Principal and Surety.****CONTRIBUTORY NEGLIGENCE—See Master and Servant; Railroads; Street Railroads.****CONVEYANCES—See Deeds; Fraudulent Conveyances; Husband and Wife; Limitation of Actions; Mortgages.****CORPORATIONS—See Attachments; Damages; Libel and Slander; Process; Public Service Corporations—**

1. Chief Officer of.—Who the chief officer of a private corporation is, is defined by Section 732, Subsection 33, of the Civil Code. *First National Bank v. Saunders Bros.*..... 374
2. Foreign Corporations to Do Business on Equality With Domestic Corporations—Construction of Section 202 of Constitution.—Under Section 202 of the Constitution a foreign corporation will not be allowed to transact business in this State on more favorable conditions than like domestic corporations, but it is not necessary that a foreign corporation seeking authority to do business in this State should be incorporated or organized according to the forms prescribed for the incor-

## CORPORATIONS—Continued—

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- poration or organization of domestic corporations. *National Benefit Association v. Clay, Insurance Commissioner*..... 409
3. Construction of Section 202 of Constitution.—Under this Section when a foreign corporation comes into this State, no matter how it was incorporated or organized in another State, it cannot do business in this State under more favorable conditions than like domestic corporations. *Id.*..... 409
4. Report to Auditor—Taxation.—Where a corporation furnished all the information required, upon blanks supplied by the auditor, in its annual report of property owned and business transacted in Kentucky, for the purpose of license taxation, the fact that it also showed the amount of its issued capital stock does not signify a fraudulent intent to evade or mislead, as the law takes no consideration of its issued capital stock in arriving at the tax. *American Tobacco Co. v. Commonwealth* .. 716
5. Assessment of—Board of Valuation and Assessment.—The judgment and action of the Board of Assessment and Valuation as to values based upon the legal evidence then obtainable, and at hand, and as fixed by statute, when recorded in the proper tax list, is conclusive upon the State as well as against the tax payer. *Id.*..... 716
6. Mistake in Determining License Tax.—Where the Board of Assessment and Valuation in determining the amount of license tax due by a corporation, by mistake took for its basis of calculation the capital stock issued by the company instead of that which the law authorized it to show, the Commonwealth is entitled to recover the amount which, by reason of this mistake, it has been deprived of, although settlement has been made and receipt in full given. *Id.*..... 716
7. Assessment of.—Where a corporation reported all of its authorized capital stock, as required by law, and by mistake the Board of Valuation and Assessment failed to assess a portion of the same, the corporation cannot be said to be delinquent and subject to the 20 per cent. statutory penalty, but comes within the exception of Section 4260 of one who has duly listed his property. *Id.*..... 716

COSTS—See Action.

COUNTERCLAIM—See Landlord and Tenant.

COUNTIES—See Fiscal Courts—

Liability on Implied Contract.—A county is not liable on an implied contract growing out of the fact that it accepted services rendered or materials furnished; it can never become a debtor by implication, but only by virtue of an express contract, made by its authorized officers in the manner and form provided by law. *Letcher Fiscal Court v. Spangler*..... 314

## COURTS—See Contempt; Fiscal Courts; Verdict—

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1. *Stare Decisis*.—The judgment appealed from is reversed upon the authority of *Commonwealth v. Ewald Iron Co.*, 153 Ky., 116; *Commonwealth v. Standard Oil Co. of Kentucky*, 162 Ky., 149, and *Commonwealth v. Inter-Southern Life Insurance Co.*, 162 Ky., 228, where the precise question here presented, was decided adversely to the decision of the trial court. *Commonwealth v. Kosmos Portland Cement Co.*..... 491
2. *Jurisdictional Amount*.—Where plaintiff sued for \$720 for damages to a shipment of live stock and \$25.80 for overcharge in freight rate thereon, and defendant presented a valid defense to the claim for damage to the livestock by answer, demurrer to which was overruled by the court, plaintiff declining to plead further, so that there remained in controversy only \$25.80, the circuit court was without jurisdiction to entertain the proceeding further, and properly dismissed the entire petition. *Armstrong v. I. C. R. Co.*..... 539

## COVENANTS—See Landlord and Tenant.

## CREDIBILITY—See Trial.

## CREDITORS—See Fraudulent Conveyances.

## CRIMINAL LAW—Burglary; Homicide; Perjury—

1. *Indictment—Sufficiency on Appeal*.—Where an indictment charging a public offense is not demurred to, and no motion in arrest of judgment is made in the court below, its sufficiency cannot be raised for the first time on appeal. *Cheek v. Commonwealth* ..... 56
2. *Instructions—Grounds for New Trial*.—Errors in instructions given in a criminal case cannot be considered on appeal unless included in the motion and grounds for a new trial. *Id.*..... 56
3. *Burglary—Evidence—Sufficiency*.—On a prosecution for burglary, evidence considered and held sufficient to sustain a conviction. *Id.* .. 56
4. *Rape—Carnal Knowledge of Female Under 16 Years of Age*.—Appellant was indicted for rape and found guilty of carnally knowing a female under 16 years of age. The offense of which he was found guilty is included in the higher crime, and, therefore, the court properly instructed the jury. *Eads v. Commonwealth* ..... 89
5. *Indeterminate Sentence—Instruction*.—Under the indeterminate sentence law the jury, after being first advised of the minimum and maximum punishment fixed by law, should be instructed if they find the defendant guilty to fix a minimum sentence for any time in their discretion under the maximum and not less than the minimum sentence fixed by law and a maximum sentence for any time in their discretion greater

## CRIMINAL LAW—Continued—

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- than the minimum sentence but not more than the maximum punishment fixed by law. *Biggs v. Commonwealth*..... 103
6. Instruction—Self Defense.—An instruction reading, "If you believe from the evidence that at the time he shot and killed Henry Lewis (if he did so) the defendant, Charles Weathers, believed and had reasonable grounds for believing that he was in immediate danger of death or great bodily injury at the hands of said Lewis, and that defendant used such force and no more than was reasonably necessary, or as seemed to him at the time, in the exercise of a reasonable discretion, to be necessary to avert such danger, he is excusable on the ground of self defense and you should find him not guilty," presented correctly the law of self defense. *Weathers v. Commonwealth* .. 146
7. Homicide—Self Defense—Instruction.—On a trial for homicide, an instruction which required the jury to acquit the defendant if they believed from the evidence that the defendant "believed and had reasonable grounds to believe he was then and there in danger of loss of life or of receiving great bodily injury at the hands of said Nell, and that it was necessary, or believed by the defendant in the exercise of a reasonable judgment to be necessary, to strike said Nell, etc.," held not subject to complaint. *Deacon v. Commonwealth*..... 189
8. Trial—Misdemeanor—Absence of Defendant.—A defendant in a misdemeanor case may be tried in his absence, where his failure to appear is his own voluntary act, and does not grow out of a denial of that right. *Veal v. Commonwealth*..... 250
9. Continuance—Grounds—Sickness of Accused.—Where the Commonwealth permits the accused at the first calling of his case to show without contradiction that he is too sick to be present or to manage his defense, he is entitled to a continuance so as to give him an opportunity to exercise his constitutional right of being present at the trial, and the probability of the absence of the principal witness for the Commonwealth if a continuance was granted could in no way affect this right. *Id.*..... 250
10. Trial—Continuance—Absent Witnesses—Diligence.—Where in a criminal prosecution an affidavit for continuance on the ground of absent witnesses fails to show that subpoenas for the desired witnesses were placed in the hands of the sheriff for service, such a showing does not establish due diligence on the part of the defendant in securing the absent witnesses, sufficient to entitle him to a continuance. *Fuson v. Commonwealth* .. 341
11. Larceny—Instructions.—On a charge of grand larceny evidence by the prosecuting witness that the defendant had taken from his pocket bills amounting, in his judgment, to at least \$45.00, when taken in connection with positive testi-

## CRIMINAL LAW—Continued—

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- mony that he had previously on that day placed in that pocket bills and other money aggregating \$55.00 or \$60.00 and had expended only a small part of it, and that afterwards there was only \$2.80 in his pocket, authorized the jury to find that defendant had taken therefrom more than \$20.00. *Janes v. Commonwealth* ..... 362
12. Larceny—Instructions.—An instruction telling the jury that although they might believe the defendant took the money, yet if they further believed that at the time he was so drunk that he did not have any felonious intention to commit larceny, they would find him not guilty of a felony but would find him guilty of a trespass and fix his punishment at a fine, was not prejudicial to the appellant where the jury found him guilty of a felony, although the latter part of the instruction may have been erroneous. *Id.*..... 362
13. Confession—Competency.—Evidence by a railroad detective that, according to reports received by him through railroad channels, a certain freight car consigned to a point in Alabama when it reached its destination showed that it had been broken into and a part of its contents missing, was not competent in connection with the confession of the defendant, to show that the offense had been committed. *Taylor v. Commonwealth* ..... 498
14. Confession.—Under the express provisions of Section 240 of the Criminal Code, a confession of a defendant made outside of court must be, to authorize a conviction, accompanied by other evidence that the offense was committed. *Id.*..... 498
15. Jurisdiction.—It is fundamental that a crime is punishable only in the jurisdiction where it was committed. *Commonwealth v. Hirsch Bros. &c.*..... 549
16. Indeterminate Sentence—Instructions.—An instruction on the subject of voluntary manslaughter telling the jury that if they found the defendant guilty they should “fix his punishment at confinement in the penitentiary at any time so that it be not less than two years and not to exceed twenty-one years in the discretion of the jury,” was prejudicially erroneous under the indeterminate sentence act. *Day v. Commonwealth*..... 767
17. Indeterminate Sentence—Verdict—Judgment.—Under the indeterminate sentence law the verdict of the jury must fix a minimum and a maximum sentence and the judgment must conform to the verdict. *Id.*..... 768

CROSSINGS—See Railroads.

CUSTOMS AND USAGES—See Master and Servant; Mines—

Repugnancy to Statutes.—A custom or usage contrary to the express provisions of a statute is void; and where there is a conflict between the custom or usage and a statutory regu-

## CUSTOMS AND USAGES—Continued—

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lation, the statutory regulation must control. *Palmer's Admx. v. Empire Coal Co.* ..... 130

**DAMAGES**—See Carriers; Employers' Liability Act; Evidence; Negligence; Master and Servant; Personal Injuries; Pleading; Public Service Corporations; Railroads—

1. Action—Evidence—Instruction.—Where in an action for damages against a corporation and its agent evidence was admitted which was competent against the agent but not against the corporation, an only instruction authorizing a recovery is prejudicial, where it requires the jury to find against both the corporation and the agent if they believe that the agent was negligent. *Standard Oil Co. v. Marlow* ..... 1
2. Stock Killed by Train—Evidence—Peremptory.—In an action to recover damages for two horses alleged to have been killed at Campbell's crossing about 3:20 A. M., on Saturday, September 16, 1911, the testimony of a witness that on a Saturday morning in September, 1911, between the hours of two and three o'clock, he saw two horses struck and killed by defendant's train at said crossing, and that the engine did not whistle for the crossing, held sufficient to take the case to the jury, and that the trial court erred in peremptorily instructing the jury to find for defendant. *Campbell v. M. & O. R. Co.* ..... 58
3. Excessive Damages.—This court is not authorized to grant a new trial merely on the ground that the assessment of damages is excessive, unless they appear to have been awarded under influence of passion or prejudice or are so excessive as to be entirely out of proportion to the injury sustained. *Rosenberg v. Dahl* ..... 93
4. Detaining Female Against Her Will.—The attempted crime of fornication and adultery when accompanied with taking and detaining the female against her will is a complete offense under the statute, and being so it is actionable at common law, and by Section 466, Kentucky Statutes. *Hatchett v. Blacketer* ..... 266
5. Detaining Female Against Her Will—What Constitutes Such Detention.—The laying of hands upon a woman and squeezing her breasts was such taking and detaining as contemplated by statute. *Id.* ..... 266
6. An unaccomplished purpose can only be determined by surrounding circumstances. *Id.* ..... 266
7. When Not Regarded Excessive.—A verdict awarding an employe's widow \$16,000.00 damages for his death, will not be regarded excessive, where it is made to appear from the evidence that he was a sober, industrious man, forty-five years of age; and that his earnings as a locomotive engineer had averaged \$160.00 per month and his life expectancy was 24.46



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years, that of the widow practically the same; and the amount of the verdict is but little more than a third of the aggregate sum of his probable earnings during his life expectancy.

C. & O. R. Co. v. Dwyer's Admx..... 427

8. Settlement—Validity.—Where in an action for damages for personal injuries, defendant pleaded a settlement, evidence examined, and held that plaintiff freely and voluntarily made the settlement at a time when he was mentally capable of contracting, and knew and fully appreciated the effect of the release which he signed, and that the settlement was not obtained by fraud; the court, therefore, should have directed a verdict in favor of the defendants. Carter Coal Co. v. Collins..... 815

DEATH—See Insurance; Employers' Liability Act; Limitation of Actions, 5.

DECEDENTS' ESTATES—See Judgment; Wills.

DEEDS—See Adverse Possession; Mortgages, 1, 3—

1. The courts make a distinction between testamentary deeds and a deed which is the result of an ordinary business transaction, and where the parties are dealing with each other as business antagonists. Sellers v. Sellers..... 9
2. Exception—Construction.—Under a deed of conveyance excepting therefrom one-half acre of land at the grave, including the graveyard, with privileges of passing to and from said graveyard, the land excepted can be used only for graveyard purposes. Damron v. Justice ..... 101
3. Deed by Married Woman—Failure of Husband to Join—Possession.—Where a married woman executes and delivers a deed to her lands in which her husband does not join, and puts the vendee in actual possession, it is void so far as it attempts to convey title, but it is sufficient to show the nature and extent of the possession of the vendee under the deed, and where he enters upon a tract of land under such deed, and claims to the extent of the boundaries of it, he becomes possessed of the whole so far as it is not adversely held by others. Big Sandy Co. v. Ramey ..... 236
4. Description—Intention of Parties.—A recital of quantity in a patent or deed is merely descriptive, and yields even to courses and distances, unless the instrument makes it clear that it was the intention to convey only a definite quantity. Rock Creek Property Co. v. Hill ..... 324
5. Construction.—The rule is well established in this State, that courses and distances yield to the calls for the lines of other patents, which are of record and susceptible of definite and certain location. Id. .... 324
6. Intention of Parties.—In the construction of deeds and conveyances the court seeks the intention of the parties. Id..... 324

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7. Construction of.—The meaning of a deed, that is, what it covers, is a question of law for the court; what the boundaries of a given piece of land are, is a question of construction for the court also; where they are is a question of fact for the jury. *Commonwealth v. Stahr* ..... 389
8. Trusts.—Where a trust deed reads, "for the use and benefit of my son, and his family," the wife and children were entitled to a portion of the benefits stipulated in the deed so long as they remained members of his family. *Woodford v. Woodford* ..... 542
9. Evidence of Mistake—Admissibility.—Evidence of a mistake in a deed is only competent in a direct action brought for the purpose of reforming the deed within the statutory time. *Riddle v. Runnions* ..... 750
10. Cancellation—Mental Incapacity—Evidence.—In an action to cancel a deed because of the mental incapacity of the grantors, evidence examined, and held that the grantors had sufficient mental capacity to know and appreciate the effect of the deed which they signed. *Walker v. Maddox* ..... 784
11. Consideration—Support of Grantors—Violation of Agreement—Evidence.—Where the grantors conveyed to their daughter their home place, the consideration being that the daughter should maintain and support them during their life, held, in an action by one of the grantors to cancel the deed because the grantee had failed to carry out her agreement, that the grantee had not failed to comply with her agreement, and that there was no valid reason to cancel the deed. *Id.* ..... 784
12. Trusts.—Where a husband freely and voluntarily unites with his wife in a deed conveying certain land to his daughter in consideration of support, he parts with all interest in the land, and is not entitled to have a trust declared in his favor on the ground that, though the deed was made to his wife, he furnished the money to pay for the land. *Id.* ..... 784
13. Consideration—Agreement to Support.—Where the grantor executed a deed in consideration of the grantee's agreement to support and maintain him during his natural life, and he voluntarily leaves the grantee's home, held, that an allowance of \$100 to him while living away from the grantee's home was sufficient, in the absence of such mistreatment on the part of the grantee, or such friction as made it no longer agreeable to him to live there, or the refusal of the grantee to permit him to live there. *Id.* ..... 784

DEFAULT—See Principal and Surety; Statute of Frauds.

DEFECTS—See Mechanics' Liens.

DELIVERY—See Contracts; Sales.

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## DEPOSITIONS—

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When and Upon What Conditions They May Be Read by Adverse Party.—Where a deposition has been taken by one party and filed in the cause, his adversary is entitled to use it as evidence, although the party taking it refused to introduce it in his own behalf; but it would be error to permit the reading of a part of such deposition and to refuse to compel the reading of the whole of it, if the reading of the whole be demanded by the other party. *Jonas v. South Cov. & Cin. St. R. Co.* ..... 172

## DESCENT AND DISTRIBUTION—See Judgment—

Persons Entitled and Their Respective Shares—Pretermitted Child.—Where there is a general devise to “the children” of testator without specifically naming them, a child en ventre sa mere at the death of the testator, although posthumous, is not pretermitted. All the children are included, and therefore none are pretermitted. *Lamar v. Crossby* ..... 320

## DESCRIPTION—See Deeds.

## DETENTION—See Damages.

## DEVISES—See Wills.

## DISCRETION—See Criminal Law, 2; Divorce; Pleading.

## DISMISSAL—See Appeal.

## DIVISION—See Land.

## DIVORCE—See Husband and Wife—

1. From Bed and Board—Grounds For.—Where a divorce a vinculo is sought by the wife on the ground that the husband habitually behaved towards her for not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her, and to destroy permanently her peace and happiness, although the evidence may not show any act of violence committed by the husband upon the wife, threats of violence, or punishment actually inflicted by him upon her, if it conduces to prove that the conduct on his part complained of is of such a character as to show that he is lacking in affection for her, and so ill-tempered toward her as to manifest a total disregard of the marital relation, and the unhappiness thereby caused the wife would equal in cruelty actual punishment inflicted upon her, such evidence will at least authorize the granting to her by the court of a divorce from bed and board. *Ramsey v. Ramsey*..... 741
2. Discretion of Court as to Granting.—Section 2121, Kentucky Statutes, confers upon courts of equity the power to grant a

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- divorce from bed and board for any of the causes which allow divorce, or for such other cause as the court, in its discretion, may deem sufficient. The discretion thus allowed the court is not arbitrary or unlimited, but a sound discretion and one to be exercised for such causes as may be deemed to be sufficient, when considered with a just and reasonable regard to the legal rights and obligations of both parties. *Id.* 742
3. Alimony—When Allowed—Amount of.—If entitled to a divorce from bed and board, the wife is likewise entitled to alimony, and where it is made to appear from the evidence that the husband's earnings as a locomotive fireman amount to not less than \$70.00 and occasionally as much as \$100.00 per month, he should be required to pay the wife at least \$25.00 per month for her support, and \$10.00 per month, in addition, for the support of their infant child, two years of age. *Id.* 742

## DOMICILE—See Judgment, 18—

1. Residence.—Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation; it does not include as much as domicile, which requires an intention combined with residence. *L. & N. R. Co. v. Mitchell* 254
2. Residence.—One may seek a place for the purpose of pleasure, or business, or of health; if his intent be to remain, it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence. *Id.* 254
3. How Changed—Insane Person Incapable of Changing Domicile.—In order to enable one to change his legal residence or domicile or acquire a new domicile, there must be: (1) Freedom of choice; (2) bodily presence in the chosen locality; (3) an intention to remain there permanently. An insane person, being incapable of either choice or intention, cannot legally change his domicile. *Sumrall's Committee v. Commonwealth* 653
4. Of Insane Person—Where Located—Situs of Property of for Taxation—Powers of Committee.—Where an insane person, residing in this State until he became insane, was sent by his father to an asylum in another State for care and treatment, and there kept until the father's death two years later, following which, under an inquest of the Boyle County Court, he was found by a verdict of a jury and judgment of the court to be a lunatic and a committee appointed to take charge of his person and estate, the fact that the committee allowed him to remain in the asylum of another State where he had previously been maintained by the father, did not have the legal effect to fix the lunatic's domicile in such other State or remove it from Kentucky. Such domicile continued and

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- yet remains in Boyle County, Kentucky, where the committee must steadily make settlements of the estate and list it for taxation and pay taxes thereon. The committee cannot by its mere election fix the lunatic's legal domicile in another State. It may have the power to change the lunatic's municipal domicile, that is, from one place to another within this State, but it is without power to change his national or quasi-national domicile by removing it from this State to another State. *Id.* ..... 658
5. Residence.—A person cannot have a legal residence in two states or countries, although he may have an actual residence in many places and his actual residence may be in one place and his legal residence in another. *Baker v. Baker, Eccles & Co.* ..... 685
6. Residence—Intention—Acts and Conduct.—The place of legal residence is fixed both by intention and acts and conduct, and when it is difficult to reconcile the intention with the acts and conduct, the law will, from the facts and circumstances, fix the legal residence. *Id.* ..... 685
7. Residence—Definition of Legal Residence.—If a person has actually removed to another place with the intention of remaining there for an indefinite time and as a place of fixed domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a "floating intention" to return at some future period. *Id.* ..... 685
8. Residence—Intention—Acts and Conduct.—When there is a conflict between intention and acts and conduct, the acts and conduct will control. *Id.* ..... 685

DRUNKENNESS—See Argument of Counsel.

## EASEMENTS—

1. Obstruction—Evidence.—In an action to enforce a right of passway to a graveyard, evidence examined and held to sustain the finding of the chancellor that the passway was obstructed. *Damron v. Justice.* ..... 101
2. Obstruction—Action to Enforce—Cost.—Where plaintiff is compelled to bring an action in order to enforce his right of passway to a graveyard, he is entitled to recover of defendants the cost of the action, including the cost of laying off the half-acre of ground including the graveyard, and establishing a route thereto. *Id.* ..... 101
3. Passway—Gates—Erection, Maintenance, Closing and Fastening—Duties of Owner of Passway and Owner of Servient Estate.—Where a deed reserving a passway to a graveyard contains no stipulation to the contrary, it is not error to impose on the owner of a passway the duty of erecting, maintaining, closing and fastening the gate leading from the public road to the passway. *Id.* ..... 101

**EASEMENTS—Continued—****Page**

4. **Passway—Consideration.**—Where the trustees of a church are granted the use of a passway to the public road in consideration of the construction of a road over such passway, and continue to use the passway for a period of fifteen years as a matter of right, they acquire an indefeasible right to the passway as it existed during that time and may enjoin its obstruction. *Oak Grove Missionary Baptist Church, &c. v. Rice* ..... 525
5. **Obstruction—Evidence.**—In an action by plaintiffs to enjoin the obstruction of a passway, by the erection of gates thereon by the owner of the land, evidence examined, and held that such gates were not reasonably necessary for the protection of defendant's land, and were an obstruction to the passway. *Id.* ..... 526

**EDUCATION—See Schools and School Districts.****EJECTMENT—See Tenancy in Common—**

1. **Possession—Title.**—Under the Code, it is sufficient in a suit in ejectment for the plaintiffs to allege that they are the owners and entitled to possession of the land described. It is not necessary to allege and show how title was derived. This should come in the evidence to support the allegation of ownership. *War Fork Land Co. v. Spivey, etc.*..... 600
2. **Adverse Possession.**—In a suit in ejectment the plaintiff must recover, if at all, upon the strength of his own title and not the weakness of his adversary's, but when the defendant admits that the title was once in plaintiff, the burden shifts, and it is then upon him to show that the plaintiff has been divested of title by subsequent conveyance or by adverse possession. *Id.* ..... 600
3. **Title.**—When the plaintiff in ejectment shows a title *prima facie* valid, it then devolves upon the defendant to show a superior adverse title. *Id.* ..... 600

**ELECTION—See Wills.****ELECTIONS—See Appeal;; Intoxicating Liquors; Municipal Corporations; Schools and School Districts—**

1. Where the election officers failed to perform their clerical statutory duty of detaching and destroying the unused ballots, but returned them to the clerk, their action constituted a mere irregularity, which did not invalidate the election. *Barry v. Town of New Haven*..... 61
2. **Schools—Qualification of Women Voters—Ability to Read and Write.**—In order to comply with the statute allowing women to vote in school elections, and providing that they shall be able to read and write, it is sufficient if the voter can read

## ELECTIONS—Continued—

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- in a reasonably intelligible manner sentences composed of words in common use, and of average difficulty, though each and every word may not always be accurately pronounced; on the other hand, one is able to write who, by the use of alphabetical signs, can express in a fairly legible way words in common use and of average difficulty, though each and every word may not be accurately spelled. *Justice v. Meade*..... 421
3. Contest—Evidence—Tie.—In a contest over an election for school trustee, evidence examined, and held that each party received the same number of votes. *Id.*..... 421
  4. Submission of Question to Voters—Compliance With Statutes.—In the submission of public questions to the voters, a substantial compliance with the statute as to the manner and form of submission is sufficient; but where the submission is in such ambiguous and unintelligible form as to be confusing to the elector, or as to make it uncertain how he shall mark his ballot so as to register his intention, the election will be held invalid. *Armstrong v. Fiscal Court of Carter County*..... 564
  5. Purpose of Holding Elections.—The purpose of holding elections is to ascertain the public will, and neither the courts nor the election authorities are authorized to arbitrarily assume that the voters meant something which cannot be fairly ascertained from the ballots themselves. *Id.*..... 564
  6. Ambiguity.—The question: "Are you for or against voting bonds on the county of Carter, State of Kentucky, for the purpose of building roads and bridges to the amount of one hundred and fifty thousand (\$150,000) dollars in Carter County?" is in such ambiguous form as that the electors might well have differed as to the manner of marking their ballots so as to register their several intentions; therefore the will of the voters could not well be ascertained under such a submission. *Id.*..... 564

EMPLOYEE—See Employers' Liability Act.

EMPLOYMRS' LIABILITY ACT—See Master and Servant—

1. Employee Defined.—Under the Federal Employers' Liability Act an employee who is engaged in interstate commerce while actually employed at his work will be treated as in the course of his employment when he is going to or from his work on the premises of the employer in a car appointed by his employer for the purpose of carrying him to or from his work, or while he is walking to or from his work on the premises of the employer and along the way set apart by the employer as a means of ingress and egress. *L. & N. R. Co. v. Walker's Admr.* .. 209
2. Liability for Negligence of Employee Not Engaged in Interstate Commerce.—To entitle an employee engaged in inter-

**EMPLOYERS' LIABILITY ACT—Continued—**

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- state commerce to recover damages for injuries sustained in such commerce, it is not necessary that the injuries should have been caused by the negligence of another employe engaged in interstate commerce. It will be sufficient if the negligent party was an employe of the company. *Id.*..... 210
3. Action Under—Widow Only Dependent—Entitled to Entire Amount Recovered.—In an action brought by the personal representative, under the "Employers' Liability Act," to recover damages of a railroad company for the death of an employe, caused by the negligence of the railroad company, if the widow of the decedent is the only dependent beneficiary under the act, she will be entitled to take all the damages that may be recovered. *C. & O. R. Co. v. Dwyer's Admx.*..... 427
4. Measure of Damages—Instruction With Respect to.—The damages recoverable under the "Employers' Liability Act" by or for a deceased employe's widow as sole beneficiary, is such a sum as will fairly and reasonably compensate her for the pecuniary loss, if any, sustained by her on account of his death; and an instruction which, as in this case, so told the jury, and also told them that, in fixing the amount, they were authorized to take into consideration the decedent's age, habits, business ability, earning capacity and the probable duration of his life, as well as the pecuniary loss, if any, the widow sustained by being deprived of such support and maintenance, if any, as the evidence may have shown she would have derived from the decedent, had he lived; but that the damages allowed should be confined to the period of the widow's dependency, and not exceed the aggregate sum of the decedent's probable earnings during his expectancy of life, nor more than the sum sued for in the petition, properly advised them of the law as to the measure of damages in the meaning of the act. *Id.*..... 427

**EQUITABLE ASSIGNMENTS—See Assignments.****ESTOPPEL—See Contracts; Liens.**

**EVIDENCE—See Appeal; Burglary; Criminal Law; Contempt; Contracts; Damages; Depositions; Easements; Homicide; Land; New Trial; Master and Servant; Mechanics' Liens; Pleading; Principal and Agent; Public Service Corporations; Railroads; Title; Wills—**

1. Weight of for Jury—Answers of Witness Not Conclusive.—The jury are not bound to accept as true the direct answers of a witness to one or more questions, but may, upon the whole of his evidence, disregard his "yes and no" answers, and, upon the facts and circumstances disclosed by his evidence, find a



## EVIDENCE—Continued—

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- verdict contrary to his express declarations. *Rosenberg v. Dahl* ..... 92
2. Spontaneous Exclamations—*Res Gestae*—Time of Utterance.—Deceased was engaged in a fight at a ball game. Defendant approached and struck him with a baseball bat, fracturing his skull. Deceased was rendered immediately unconscious. He was carried a few feet away, and immediately on regaining consciousness, asked "Who hit me?" Held, that the exclamation was as much a part of the occurrence or transaction as if it had been made the very moment after he was struck, and was therefore properly admitted in evidence as a part of the *res gestae*. *Deacon v. Commonwealth* ..... 188
3. Statement of Fact.—On a trial for homicide, the question whether or not the deceased saw the defendant at the time he was struck, called for a statement of fact, and not a mere opinion or conclusion on the part of the witnesses. *Id.* ..... 189
4. Homicide—Character of Deceased.—On a trial for homicide, where the bad reputation of the deceased for peace and quiet was established by uncontroverted evidence of two witnesses, it was not prejudicial error to refuse evidence tending to establish his bad reputation for peace and quiet eight or ten years before the homicide. *Id.* ..... 189
5. Paper Releasing Claim for Damages—Mistake in Execution of—Instructions.—Where a person who was injured by the alleged negligence of two parties received from one of them after suit was brought a certain sum in settlement of his claim for damages and executed a writing to this effect, the writing, unexplained, would be a bar to the prosecution of the action, but where it appeared from the evidence that it was the intention of all parties that the paper was only to release the one to whom it was given, the court properly instructed the jury that they should find for the other defendant unless they believe that the paper was only intended to be a release as to the one to whom it was given. *Lawrence v. Board of Councilmen of the City of Frankfort* ..... 528
6. Damages—Action for Assault Upon Female—Verdict.—In an action for assault upon a female with intent to have carnal knowledge of her, the evidence is examined and held sufficient to support the verdict. *Bagwell v. Copeland, &c.* ..... 620
7. Witnesses.—Where the defendant had in his evidence attacked the moral character of the plaintiff, and in rebuttal the plaintiff's attorney announced that he had some character witnesses to introduce and the court said, "let them be considered introduced," the defendant cannot complain of being deprived of the right to cross-examine such witnesses when the record fails to show that they were ever in fact introduced, or that any statement as to what their evidence would be was submitted to the jury. *Id.* ..... 620

## EVIDENCE—Continued—

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8. Mercantile Books—When Incompetent.—In an action to recover damages of a street railway company for injuries received by the plaintiff in attempting to board one of its cars, the driver of an ice cream wagon, who testified as to the accident as a witness for the defendant, cannot be contradicted or his evidence impeached by the books of the ice cream manufactory for which he was driving, which were introduced for the purpose of showing that they contained no orders for ice cream requiring its delivery by the witness at or west of the place of the accident on the morning of its occurrence. *Louisville Railway Co. v. Kritzky*..... 652
9. Reasons for Exclusion of Such Evidence.—The introduction of the books in the manner and for the purpose indicated was inadmissible because: (1) They were not shown to have been properly kept; (2) Mercantile books can only be admitted as affirmative evidence and are never admissible to establish a negative proposition. *Id.*..... 652

EXCEPTIONS—See Deeds.

EXCESSIVE DAMAGES—See Damages.

EXCLUSION—See Evidence, 8, 9.

## EXECUTION—

Sale—Levy—Indorsement.—The failure to endorse the levy upon the execution, or any paper thereto attached, invalidates the execution sale. *Leath v. Deweese*..... 227

EXECUTORS AND ADMINISTRATORS—See Limitation of Actions—

Appointment Qualification and Tenure—Removal.—An administrator properly appointed may not be removed without cause. *Oscar Davis' Admr. v. Ruth Davis*..... 316

EXEMPLARY DAMAGES—See Master and Servant, 16.

EXPENDITURES—See Schools and School Districts, 10.

EXTRA-TERRITORIAL—See Judgment, 16.

## FALSE PRETENSES—

1. Indictment for—When Defective.—An indictment for obtaining money by false pretenses, which charges the defendant with inducing the prosecutrix to buy of him a picture and picture frame, at a price not greater than its actual value, by falsely representing to her that a person or company, unnamed, whom he represented, would at some time in the future, not

## FALSE PRETENSES—Continued—

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- indicated, give her a Singer sewing machine, does not state an offense under the statute; hence, a demurrer to such indictment was properly sustained. *Commonwealth v. Tidwell*..... 114
2. When Not a False Pretense.—A false promise to do something resting upon an event to happen in the future, is not within the statute denouncing false pretenses, unless it is coupled with a false statement or representation as to a past or existing fact or facts, which induces another to rely upon the false promise, and by reason thereof, be defrauded and deprived of his money or property. *Id.*..... 114

FALSE SWEARING—See Perjury.

FEDERAL EMPLOYERS' LIABILITY ACT—See Employers' Liability Act; Master and Servant, 10; Railroads, 11; Trial, 15.

FIDUCIARY RELATIONS—See Bonds.

FINDINGS—See Appeal; Contracts, 12.

FIRES—See Landlord and Tenant; Railroads.

## FISCAL COURTS—

1. Power to Control Property of the County—Conflict of Authority With Jailer.—Under Section 1840 of the Kentucky Statutes, the fiscal court has jurisdiction to regulate and control the fiscal affairs and property of the county, and when it leases property of the county that is not needed for public business or purposes to private persons, the jailer of the county cannot, by an action in ejectment, dispossess the lessees without the consent of the fiscal court. The authority of the fiscal court in the conduct of the business of the county is superior to that of the jailer, except in cases in which the jailer is by statute given paramount authority. *Bath County v. Denton* ..... 47
2. Order of Fiscal Court.—An order of a fiscal court which was never read publicly by the clerk, nor signed by the county or presiding judge, with the approval of the justices present, is not a valid order for any purpose. *Fox v. Lantrip*..... 179

## FORCIBLE ENTRY AND DETAINER—

1. Possession—Title.—A proceeding of forcible entry involves only the possession of land; the title thereto is not involved in any way. *Holman, et al. v. Parsons*..... 454
2. One who enters upon land in the actual possession of another, without his consent, may be removed by a writ of forcible entry and detainer though the right of entry was in him, and an action instituted by him involving the title and right of possession was pending. *Id.*..... 454

**FORCIBLE ENTRY AND DETAINER—Continued—** Page

3. Evidence—Possession.—In a forcible entry proceeding the plaintiff having the paper title may put his deed in evidence to show the extent of his possession. *Id.*..... 454

**FOREIGN CORPORATIONS—See Corporations.****FOREIGN JUDGMENT—See Judgment.****FRATERNAL INSURANCE—See Insurance.****FRAUD—See Contracts; Fraudulent Conveyances; Insurance, 11, 13; Partnership; Statute of Frauds.****FRAUDULENT CONVEYANCES—**

1. Transfers and Transactions Invalid.—A conveyance without consideration is void as to existing liabilities, but not as to debts subsequently created. *Pace's Trustee v. Pace, et al.*..... 457
2. Remedies of Creditors and Purchasers—Persons Entitled to Assert Invalidity.—Only persons who are prejudiced by a conveyance alleged to be fraudulent may call its validity into question; and the party claiming under such conveyance may impeach the claim of the attacking creditor and interpose any defense, including a plea of the statute of limitations, which the grantor himself might have invoked in a direct action upon the claim; the effect of such defenses when interposed by the grantee being to deny prejudice to the attacking creditor resulting from the conveyance sought to be invalidated. *Id.*..... 457
3. Conveyance by Husband to Wife—Question of Fraud.—The question whether a voluntary conveyance from a husband to his wife is fraudulent, is not to be determined from the mere fact that the husband was indebted at the time, but from all the circumstances of the case; and if the circumstances do not establish fraud, the conveyance is deemed to be above exception. *Goff, &c. v. Daniels*..... 616
4. As to subsequent creditors a conveyance is not fraudulent merely because it is voluntary. *Id.*..... 616

**GRADED SCHOOLS—See Schools and School Districts.****GROUND—See Argument of Counsel; Contracts, 1; Criminal Law, 2; Divorce; New Trial, 3.****GUARDIAN AND WARD—**

Appointment—Qualification and Tenure—Removal.—A guardian may be removed when evidently unsuited for the duties of the position. *Davis v. Davis*..... 316

**HIGHWAYS—See Municipal Corporations, 15.**

**HOMICIDE—See Criminal Law; Evidence—****Page**

**Evidence—Self Defense—Instructions.**—On a trial for murder where the evidence tends to show that throughout the difficulty others were acting in concert with the deceased, an instruction on self defense should embrace the idea that if the defendant believed and had reasonable grounds to believe that he was then and there in danger of death or the infliction of great bodily harm either at the hands of the decedent or of such others acting in concert with him, and that it was necessary or believed by him to be necessary in the exercise of a reasonable judgment to shoot the decedent to avert such danger, real or apparent, he was entitled to an acquittal. *Hall v. Commonwealth* ..... **439**

**HORSES—See Animals.****HOUSE BREAKING—See Burglary; Indictment.****HUSBAND AND WIFE—See Adverse Possession; Deeds; Divorce; Fraudulent Conveyances; Wills—**

1. **Divorce—Alimony.**—A married woman who is a non-resident of this State, and who, in a suit by her husband, in a court of this State for divorce, is summoned by constructive process, may at any time within five years from the rendition of the judgment, enter her appearance and file an answer and counter claim, and although she may not interfere with the judgment granting the divorce, she may, by showing that the husband ought not to have been granted a divorce, obtain a judgment for alimony against him, and have any other property rights, which she may have, determined. *Hughes v. Hughes* ..... **505**
2. **Divorce.**—The wife's rights under a trust deed executed to a third party for the use and benefit of the husband and family, terminates with divorce, and it is the duty of the court to modify or set aside a former order granting her a portion of the rents and profits arising therefrom, where the court reserved in such order the right to change or modify the same. *Woodford v. Woodford* ..... **542**
3. **Conveyance by Husband to Wife—When Court of Equity Will Approve.**—If a court of equity would have required a husband to convey to his wife land which was bought with her money and conveyed to him by mistake, it will approve a conveyance of said land which he voluntarily made to his wife. *Goff v. Daniels* ..... **616**

**IDENTIFICATION—See Taxation.****IMPEACHMENT—See Evidence.****IMPROVEMENTS—See Municipal Corporations.**

INCOMPETENCY—See Evidence; New Trial.

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INDEBTEDNESS—See Municipal Corporations.

INDECENCY—See Nuisance.

INDEMNITY—See Mortgages.

INDICTMENT—See Criminal Law; False Pretenses; Prejury—

1. Indictment Under Section 1164, Kentucky Statutes.—An indictment under Section 1164 of the Kentucky Statutes, which charges in both the accusatory and in the descriptive portions of the indictment, that the accused "feloniously broke and entered a store-house and did feloniously take and steal therefrom articles of value, the property of another person," does not charge but one offense, and is not vitiated for duplicity. *Drury v. Commonwealth* ..... 123
2. An indictment which, in the accusatory part of it, charged the accused with the offense of feloniously breaking and entering into a house of another with intent to steal therefrom, and in the descriptive portion of the indictment alleged that the offense was committed by feloniously breaking and entering into a retail liquor house, wherein a saloon was conducted, with felonious intent to steal therefrom articles of value, is an indictment for violation of Section 1164 of the Kentucky Statutes, and is sufficient upon demurrer, being certain as to the offense charged. *Id.* ..... 123
3. To Determine Certainty of Offense Charged.—In determining whether an indictment for a statutory offense is direct and certain as to the offense charged, the court will look to the entire indictment. *Id.* ..... 126

INDORSEMENT—See Execution.

INJUNCTION—See Landlord and Tenant.

INSANE PERSONS—See Domicile.

INSOLVENCY—See Partnership.

INSPECTION—See Contracts; Railroads, 12.

INSTRUCTIONS—See Appeal; Burglary; Champerty and Maintenance; Criminal Law; Damages; Evidence; Insurance; Perjury; Railroads; Sales; Self Defense; Wills—

The mere circumstance that an instruction, although a proper one, was not given on the first trial, and, therefore, not considered and approved by this court on appeal, does not of itself preclude the giving of it on a second trial. *Andonique v. Carmen* .....

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INSURABLE INTEREST—See Insurance.

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## INSURANCE—

## Accident and health insurance—

1. Accident—Suicide Clause—Pleading—Necessary Allegations.  
—In an action to recover for the death of the insured on an accident insurance policy providing "suicide, sane or insane, is not covered," it is not necessary to allege that the insured did not commit suicide. *Philadelphia Life Ins. Co. v. Farnsley's Admr.* ..... 27
2. Accident—Cause of Death—Pleading—Necessary Allegations.  
—In an action to recover for the death of the insured on an accident policy providing indemnity for loss of life "resulting directly and independently of all other causes, from bodily injuries effected through external, violent and accidental means," a petition which alleges that the decedent did meet an accidental death effected through external, violent and accidental means, and that decedent "while crossing a gang plank lying between a barge and steamboat, both vessels lying in the Mississippi river near Cairo, Illinois, accidentally slipped from the plank across which he was walking and fell into the Mississippi river between the boat and barge and was drowned," and thus describes the precise circumstances and cause of the decedent's death, is sufficient to negative the idea that other causes than those specified contributed to the decedent's death, and therefore to dispense with the necessity of alleging that his death resulted directly and independently of all other causes, from bodily injuries, etc. *Id.* 27

## Insurance on persons—

3. Action to Set Aside Writing Expressing Willingness to Cancel Contract of—Fraud.—A writing signed by insured expressing a willingness to have a contract of insurance canceled does not amount to an agreement to cancel, and the evidence showing it was procured by the fraud and misrepresentation of an agent of the company by which the insured who was sick and in a weakened condition, was overreached, the writing was properly set aside. *Independent Life Ins. Co. v. Evans*..... 150
4. Insurable Interest—What Constitutes Interest in Human Life.  
—The relationship of uncle and nephew or niece is not of itself sufficient to constitute an insurable interest upon the part of either in the life of the other where there is no reasonable ground or expectation of support to be furnished by the assured to the other. *Equitable Life Assurance v. O'Connor's Admr.* ..... 262
5. Insurable Interest—Wagering Policies in General.—Where the assignment of a policy of insurance was contemplated at the time it was procured to be issued, the first and all sub-

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- sequent premiums to be paid by the assignee, and he to receive the proceeds of the policy, and the assignee lacks insurable interest in the life of the insured, the assignment is void, barring recovery by the assignee from the insurer and the policy itself is void, preventing a recovery by the personal representative of the insured, from the insurer. Such an arrangement is a mere colorable evasion of the prohibition against wagering contracts, violative of a sound public policy, and unenforceable in the courts. *Id.* ..... 263
6. Right of Foreign Assessment Association to do Business in This State.—When a foreign assessment association has fully complied with the requirements of Section 680 of the Kentucky Statutes, and is in a sound condition, and there is nothing in its charter or by-laws or method of doing business that is obnoxious to the laws of this State, the Commissioner of Insurance is not authorized to refuse it a certificate to do business in this State. *National Benefit Association v. Clay, Insurance Commissioner* ..... 409
7. Powers of Commissioner.—Under Sections 752 and 753 of the Kentucky Statutes the Commissioner of Insurance has ample power to protect the people of the State against foreign companies that are not in a sound condition or that fail or refuse to comply with the laws of this State, and when a foreign corporation is admitted to do business in this State this privilege does not in any manner interfere with the right of the commissioner to compel it to do business in conformity with the laws of this State, and the provisions of its charter and by-laws, or to at any time exclude it from the State if it is doing business in violation of our law or in a manner not authorized by its charter or by-laws or if its affairs for any reason become in an unsound condition. *Id.* ..... 409
8. Fraternal Association—Death Benefit to Member of—When Association Not Liable For.—Where the constitution of a fraternal association provides that if a member holding a certificate of insurance therein becomes suspended for non-payment of an assessment, and is not, prior to his death, while in good health and within three months after the assessment became due, reinstated to membership in the order by the payment of such assessment and all arrearages then owing by him, such payment to be accompanied by a writing signed by himself and witnessed, stating that he is in good health, the insurance association, upon the insured's death, will not, in the absence of a compliance by the latter with the above provision of the constitution, be liable at the suit of the beneficiary named in the certificate of insurance for the amount thereof; and the fact that the insured before his death and within the three months indicated, sent to the clerk of the local camp, of which he was a member, the money to pay the



## INSURANCE—Continued—

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assessment, for the non-payment of which he had been suspended, and all arrearages owing by him, even if it be conceded that the sending of the accompanying written statement as to his health was not essential, did not have the effect to reinstate him to membership or entitle the beneficiary to the insurance, if he was at the time not in good health. *Howton, by etc. v. Sovereign Camp W. O. W.*..... 432

9. Instructions—When Not Prejudicial to Appellant Cannot Give Ground for Reversal.—As the instructions given in this case ignored the provision of the association's constitution requiring the furnishing by the insured of the attested written statement as to his being in good health in order to secure his reinstatement to membership, and advised the jury that the question whether the payment by the insured of the assessment and arrearages owing by him had the effect to reinstate him, depended upon whether he was at the time of such payment in good health, were more prejudicial to the association than to the appellants and probably more favorable to the latter than they deserved, their complaint of them is without merit. *Id.* ..... 433

## Insurance on property—

10. Assignment or Other Transfer of Policy—Effect of.—The assignment of a policy of fire insurance by consent of the insurer creates a new and independent contract equivalent to the original issue of a policy by the insurer direct to the assignee. *Niagara Fire Insurance Co. v. Layne*..... 665
11. Avoidance for Misrepresentation—Grounds in General—Statutory Provisions—Effect of Misrepresentations.—Where one applying for insurance makes answer to inquiries or makes statements voluntarily, if the fact be material and the answer or statements untrue, Section 639 Kentucky Statutes applies, and this court has consistently held that the policy is avoided whether the applicant knew the answer or statement to be untrue or not and regardless of any fraudulent intent on the part of the insured. But where no inquiry is made and answered concerning encumbrances and no voluntary statement in regard thereto is made by the applicant, an avoidance of the policy will not be declared unless the insured has fraudulently failed to disclose the fact of an encumbrance material to the risk assumed by the company. *Id.*..... 665
12. Avoidance for Misrepresentation—Grounds in General—Fraudulent Concealment.—Failure to disclose the existence of a lien material to the risk is fraudulent when the insured has knowledge of the encumbrance and the facts are such that an ordinarily prudent person would have known that the existence of the lien was material to the risk. *Id.*..... 665

## INSURANCE—Continued—

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13. Avoidance for Misrepresentation—Grounds in General—Materiality.—An encumbrance (or other fact) is material to the risk when, with a knowledge of the truth, an insurer acting in accordance with the usual practice or custom among insurance companies would not have issued the policy. *Id.*..... 665
14. Actions on Policies—Questions for the Jury.—The question of the materiality of an encumbrance on the insured property is ordinarily one for the jury. *Id.*..... 665
15. Insurable Interest—Building on Lands of Another Than Insured.—Where one has erected a building on the lands of another, in the absence of an agreement to that effect, he has no right to remove it; and his right even to occupy such building having ceased, he had no insurable interest therein. *Id.* 665
16. The Contract—Construction and Operation—Entire and Severable Contacts.—Where no inquiry is made of the insured and his failure to disclose his want of insurable interest in one item of property covered by the policy was fraudulent, and the want of insurable interest in the one item was material to the risk on another item covered by the policy, the entire policy will be avoided. *Id.*..... 665
17. Notice and Proof of Loss.—Failure to furnish proofs of loss within the time required by the policy will not defeat an action thereon; but the action cannot be maintained until proofs of loss are furnished; and if those furnished are insufficient and it is the purpose of the insurer to defend an action upon that ground, it is incumbent upon the insurer to state to the insured clearly the grounds of its objections to the sufficiency of the proofs of loss as submitted. *Id.*..... 665
18. The Contract—Oral Contract of Fire Insurance—Actions—Sufficiency of Evidence.—Plaintiff's evidence showed a promise upon the part of a fire insurance agent, made Dec. 15, 1912, to issue a policy of fire insurance on Jan. 1, 1913, to be effective for three years thereafter. Held, no completed contract effected. *California Insurance Co. v. Settle*..... 82

INTENTION—See Contracts; Deeds Domicile; Judgment; Wills.

## INTEREST—

Funds Retained by Owner.—Where a part of the contract price is retained by the owner, it is not error to charge him with interest after suit has been brought to settle the questions of liens and adjust the liability of the surety on the contractor's bond, where the owner fails to pay the money into court. *National Surety Co. v. Price*..... 633

INTERSTATE COMMERCE—See Carriers; Employers' Liability Act.

**INTOXICATING LIQUORS—See Constitutional Law; Landlord and Tenant, 5—**

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1. Procurement Where Liquor May be Sold.—In prosecutions for violation of the local option law it is necessary, in order to make the sale unlawful, that the purchase shall be made in local option territory; the act does not apply to the purchase or procurement of intoxicating liquors in territory where they may be lawfully purchased or procured. *Rist v. Commonwealth* ..... 30
2. Local Option Law—Place of Sale.—Where an order for whiskey, accompanied by the purchase price, is received by the seller in a county where intoxicating liquors may lawfully be sold, and, pursuant to said order, the whiskey is delivered to a common carrier, consigned to the purchaser in a local option county, the sale takes place in the county in which the order is received, and is not a violation of the local option law. *Id.* ..... 31
3. Local Option.—Under an indictment for having liquor in one's possession for sale in local option territory, the jury may take into consideration all the circumstances to determine whether the possession was for purpose of sale. *Combs v. Commonwealth* ..... 36
4. Manner of Repealing Prohibitory Law.—Section 2554 of the Kentucky Statutes authorizes a vote to be taken as to whether or not any prohibition law in force in any county, city, town, district, or precinct by virtue of any general or special act or acts shall become inoperative. *Buskirk v. Commonwealth*..... 113
5. Local Prohibitory Laws.—Local prohibitory laws relating to the sale of liquors enacted by the General Assembly prior to the adoption of the present Constitution, remain in force until annulled as provided in Chapter 81, of the Kentucky Statutes, and amendments thereto. *Id.*..... 113
6. Retail Liquor House.—A "retail liquor house" wherein a saloon is conducted is a store-house within the meaning of Section 1164, Kentucky Statutes. *Drury v. Commonwealth*..... 123
7. Local Option Election—When Effective.—A local option election held under Section 2557 of the Kentucky Statutes, as amended by the Act of 1914, becomes effective at the expiration of sixty days from the date of the entry of the certificate of the canvassing board in the order book of the county court; but if a contest be instituted, and a notice thereof is served on the county judge before the certificate has been recorded, then the certificate is not to be recorded, and the status existing before the election continues. *Hall v. Smith-McKenney Co.* ..... 159
8. Local Option Election—Contest.—Where a local option election is contested, the decision of the contest board takes the place of the certificate of the canvassing board, under subsection 6 of section 2566 of the Kentucky Statutes; and if a decision of the board be that a majority of the legal votes

## INTOXICATING LIQUORS—Continued—

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- cast at the election was against the sale of intoxicating liquors, the entry of the decision of the contest board on the order book of the county court is to have the same effect as the recording of the certificate of the canvassing board, required to be given and recorded before a contest is instituted. Id. .... 159
9. Local Option Election—Contest—Appeal.—When an appeal to the circuit court is determined, the judge of the county court may then record the decision of the contest board on his order book, unless an appeal with supersedeas is immediately taken, and everything done under the judgment before it is superseded will be valid; but when the judgment is superseded, nothing thereafter can be done by virtue of it until the appeal is determined. Id. .... 160
10. Local Option Election—Contest—Appeal.—Where the decision of the contest board was recorded on the county court order book before an appeal was taken therefrom, it is not necessary to again record the decision in case the election should finally be sustained; the decision having been properly recorded, it will be in force on the day the final judgment becomes effective, provided sixty days shall then have elapsed after the decision of the contest board was recorded. Id. .... 160
11. Jurisdiction.—Where one is charged with delivering intoxicating liquors in violation of Chapter 7, Acts 1914, held, that the delivery took place, and the offense was committed, in the county in which the same was delivered to the carrier, and that the courts in the county to which the same was assigned did not have jurisdiction. *Commonwealth v. Hirsch Bros. & Co.* ..... 549

JOINDER—See Perjury.

JOINT OWNERS—See Land; Partition.

## JUDGMENT—See Criminal Law—

1. Error in Form of Not Prejudicial.—Where "A" and "B" were made defendants but "A" only was served with process and answered, a judgment against "A" and "B" was not prejudicial to the rights of "A," as the judgment as to "B" was void. *Rosenberg v. Dahl* ..... 93
2. Surplus Matter.—Surplus matter in a judgment will not be ground for reversal unless the rights of the real defendant are prejudiced thereby. Id. .... 93
3. Enforcement of Lien—Erroneous.—In a suit to foreclose a purchase money lien on certain real estate, a judgment rescinding the sale, but granting plaintiff a writ of possession, and charging defendant with rent for the land from the date of the note was erroneous, when there was no plea or

## JUDGMENT—Continued—

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- proof that plaintiff ever had or was entitled to possession of the land. *Pitts v. Hatton* ..... 330
4. Vacation of—Petition for a New Trial.—Under Sections 518, 520 and 521 of the Civil Code, the court rendering a judgment may vacate it on the petition of the defendant after the term, if it was obtained by the fraud of the successful party and the petition and evidence in support of it show that the defendant had a defense that would have defeated the rendition of the judgment. Under these code provisions the petition must set up a defense, and it must also be supported by evidence. *Gaar, Scott & Co. v. Vanhook*..... 332
5. Vacation of—Petition for a New Trial.—Where the holder of notes given for machinery represented to the payor of the notes that if he would surrender the machinery without a suit it would be accepted in satisfaction of the debt, the agreement to and the delivery of the machinery was a sufficient consideration to support the agreement of the holder of the notes, and if the payor by the fraud of the holder was induced to sign a paper believing that it embodied the agreement as he understood it when in fact it was an answer entering his appearance to a suit that had been brought, the judgment on his petition and evidence was properly vacated, it appearing that he did not know of the institution of the suit or that judgment had been rendered against him until long afterwards. *Id.* ..... 332
6. Vacation of—New Trial—Practice.—In a suit seeking to vacate a judgment and obtain a new trial, where the petition and evidence show that the party is entitled to a new trial, the court may, on the pleading and evidence, vacate the judgment and permit the complaining party to file his answer in the original action, and a ruling like this will not bind the court when it comes to hear and determine the case on the pleadings and evidence in the original action, but may determine the issues in the original action without any reference to the petition for a new trial or the judgment rendered therein. The court may in a suit for a new trial set aside the judgment in the original action and also determine finally the rights of the parties, or he may set aside the judgment and leave the rights of the parties to be finally determined in the hearing of the original action. *Id.*..... 332
7. Constructive Service.—A personal judgment cannot be rendered against a defendant who is constructively summoned, and has not entered his appearance. *First National Bank v. Sanders Bros.* ..... 374
8. Constructive Service.—A judgment in rem cannot be rendered against a defendant constructively summoned, except in favor of a plaintiff who has acquired a lien by attachment or otherwise, against the property of the non-resident, and then the judgment can only be to subject the property of the non-

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- resident to the payment of his debt, to the extent of the proceeds of such property. *Id.*..... 374
9. Premature Rendition—Motion to Set Aside—Evidence.—On a motion to set aside a judgment on the ground that it was prematurely rendered, evidence considered, and held to sustain the finding of the chancellor that the judgment was not prematurely rendered. *Ray v. Ellis* ..... 517
10. Personal Judgment on Note—Lien on Stock Pledged.—In an action on a note secured by stock of an insurance company which has been absorbed by another company by an arrangement whereby the latter was to issue its stock in lieu of the stock of the company absorbed, it was error to render personal judgment on a note, and direct that the new stock be issued to plaintiff's attorney; the judgment should have adjudged plaintiff a lien, and ordered a sale of the stock by the commissioner after due advertisement. *Id.*..... 517
11. On Constructive Service—When Void on Account of Defect in Affidavit for Warning Order.—It is indispensable that an affidavit for a warning order against a non-resident defendant should aver that the defendant was absent from or believed to be absent from the State. In the absence of this averment the clerk has no authority to make a warning order and the judgment rendered on such constructive service is void. *Baker, et al. v. Baker, Eccles & Co.*..... 683
12. Affidavit for Warning Order—Presumption as to Sufficiency of.—When the affidavit fails to state that the defendant is absent or believed to be absent from the State, it will not be presumed that he was absent from the averment that he was a non-resident of the State and resided in another State, as he might be, legally speaking, a non-resident and yet actually be in this State when the affidavit was made. *Id.*..... 683
13. Collateral Attack on—Presumption.—When a collateral attack is made on a judgment, every presumption must be indulged that will support the judgment, for on collateral attack a judgment cannot be successfully assailed unless it is void for a want of jurisdiction in the court to render the judgment that appears upon the record. *Id.*..... 683
14. Direct and Collateral Attack Defined.—A direct attack on a judgment can only be made in the manner pointed out in the Code; that is to say, by prosecuting an appeal or by proceeding in the manner pointed out in Sections 244, 414 and 518 for the modification or vacation of judgments. An attack made on a judgment in any other way is a collateral attack. *Id.* ..... 683
15. Presumption on Collateral Attack.—If the record does not affirmatively show everything that was done, the presumption will be that the things it does not show have been done in such a manner as that there would be no defect; but if the

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- record affirmatively shows everything in such a way as that no presumption can be indulged in, the record must control. Therefore, when the whole record affirmatively shows a defect that deprives the court of jurisdiction, the judgment must be treated as void. *Id.*..... 683
16. Foreign Judgments of Probate Court—Validity and Effect of.—The judgment of a probate court of a sister State, entered in an *ex parte* proceeding, finding that the decedent was a resident of the county, does not affect the rights of persons in another State interested in the estate who were not parties to the proceedings. *Id.* ..... 684
17. Against Party Not Before Court Void.—No person can be deprived by legal proceedings of property unless he has been given notice, in the manner provided by law, that his right to the property is about to be determined and that he must defend if he desires to save it. *Id.*..... 684
18. Foreign Judgment of Probate Court—Residence.—The judgment of a probate court, rendered in an *ex parte* proceeding adjudging that the decedent was a resident of the State and county in which the court sat, does not preclude interested persons living in another State from showing, in opposition to the judgment, that the decedent was not a resident of the State or county. *Id.* ..... 684
19. Foreign Judgment—Force and Effect of on Descent and Distribution of Property.—The judgment of a court of general jurisdiction in a sister State in proceedings to settle the estate of an intestate, to which interested persons in this State were parties, by constructive service, does not affect property of the intestate having a situs in this State or determine the rights of the non-residents in such property, although it is conclusive of their rights as to property situated in the State where the judgment was rendered. *Id.*..... 684
20. Estates of Decedents—Situs of Property—Rights of Parties.—Where an intestate dies leaving property in several States, a court of sufficient jurisdiction in any of these States may, in proceedings to settle his estate, in which non-resident, interested persons are made parties by constructive service, determine conclusively the rights of all the parties as to the property situated in the State, but cannot conclusively determine their rights as to property having a situs in other States. Nor does the fact that the court adjudged that the intestate was a resident of the State change this rule. *Id.*..... 684
21. Foreign Judgments—Force and Effect of.—Where the judgment of a sister State determined the residence of an intestate and the descent of his estate in a proceeding in which non-resident, interested parties were before the court by constructive service, and a suit is brought on that judgment in this State for the purpose of recovering property here

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- situated, it may be attacked in so far as it attempts to affect property situated in this State, but it is conclusive as to the property situated in the State where it was rendered. Nor is this rule changed by the adjudication that the intestate died a resident of the State where the judgment was rendered. *Id.* ..... 684
22. Conflicting Judgments in Suits to Settle an Estate.—If an intestate dies leaving property in several States and suit is brought in each State to settle his estate on the ground that he died a resident of that State, interested non-residents who are before the court only by constructive service may attack the extra-territorial effect of any of the foreign judgments in a suit to enforce them in another State. *Id.* ..... 684
23. Merger and Bar of Causes of Action and Defenses—Matter Available in Former Action as Set-off and Not Pleased.—Where defendant has an independent claim against plaintiff, such as might be either the basis of a separate action, or might be pleaded as a set-off he is not obliged to plead it in plaintiff's action although he is at liberty to do so; and if he omits to set it up in that action, under Section 17, Civil Code, he may thereafter sue plaintiff on the claim; and having that right, he has likewise the right to interpose the claim by way of set-off when plaintiff's foreign judgment is sought to be enforced. *Bishop's Admr. v. Bishop* ..... 769

## JUDICIAL NOTICE—See Jurisdiction.

## JURISDICTION—See Appeal, 15; Carriers, 2; Courts; Criminal Law; Fiscal Courts; Intoxicating Liquors; Judgment—

1. Judicial Notice—Location of Cities and Towns.—The court and jury have the right to take cognizance of the county in which public cities and towns are situated without proof aliunde of that fact. *Combs v. Commonwealth* ..... 87
2. Pleading—Demurrer.—Where a petition stated three causes of action, one of which could be maintained in the county wherein the action was brought, a special demurrer to the jurisdiction was properly overruled, because the court had jurisdiction over one of the causes of action stated in the petition. *L. & N. R. Co. v. Mitchell* ..... 254

## JURY—See New Trial; Trial; Verdict.

## LAND—See Adverse Possession; Ejectment; Limitation of Actions—

1. Joint Owners—Division.—Where a joint owner of land which is in possession, desires it, the other joint owners must submit to a sale of it, if the shares are worth less than \$100.00 per share, or if it cannot be divided without materially impair-



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ing its value as a whole, or the interest of the ones desiring the sale; but if the shares are worth more than \$100.00 a share and it can be divided without materially impairing the value of it, or the interest of the ones desiring it, the other joint owners must submit to a division of it. *Cherry v. Cherry* .. 245

2. Division—Burden of Proof.—Prima facie, a tract of land containing 159 acres may be divided into three parts of equal value without materially impairing its value, or the value of either interest therein, and the burden of proof is upon the party contending that it is not divisible. *Id.*..... 246
3. Action to Recover—Evidence.—Plaintiff sought to recover a tract of land, claiming title by virtue of a deed from one L. S. Clark and wife, conveying the land to plaintiff's mother, and at her death to plaintiff, the consideration being certain cash and promissory notes secured by a lien on the land. Defendant claimed title through L. S. Clark, who in turn claimed title by virtue of a commissioner's deed made pursuant to orders entered in an action alleged to have been brought by Clark against plaintiff's mother to recover the purchase money notes and enforce his lien against the land, in which action the land was sold and Clark became the purchaser. Held, under the evidence, that the records of the suit having been destroyed by fire, defendant failed to show that plaintiff was divested of title by the suit in question. *Stovall v. Mayhew*.... 283
4. Action to Recover—Evidence.—Plaintiff sought to recover from defendants certain lands, claiming title through her father by deeds conveying to her all the land which the grantor owned in that vicinity, and which he had not theretofore conveyed. Defendants claimed title through a prior deed from plaintiff's father including "all the land in said boundary belonging to the party of the first part." Held, under the evidence, that the deed to defendants embraced the land subsequently conveyed to plaintiff, and that plaintiff's father had no title to the land at the time he conveyed it to her; and that the chancellor properly found for the defendants. *Riddle, &c. v. Runnions, &c.*..... 750

## LANDLORD AND TENANT—See Insurance, 14; Rent—

1. Defect in Premises—Action by Tenant for Personal Injuries.—In a suit by a tenant to recover of the landlord for personal injuries sustained by falling through a floor, occasioned by rotten joists, the defect was a latent one and the law did not impose upon the tenant the duty of tearing up the floor to inspect the same. Her duty was a reasonable inspection, such as ordinarily prudent persons would make under similar circumstances. *Andonique v. Carmen*..... 154

## LANDLORD AND TENANT—Continued—

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2. Lease—Cancellation—Violation of Covenant—Evidence.—In an action to cancel a lease on the ground that the lessee violated the covenant of use, suffered a nuisance on the premises, and committed a waste, evidence examined, and held, that the use of the building by defendant, a confectioner, to manufacture ice cream and candy, and the installation of two small motors for this purpose, was not a violation of a provision of the lease that the premises should be used for "store and dwelling." *Backman v. Courtesy*. . . . . 157
3. Lease—Cancellation—Nuisance—Evidence.—In an action to cancel a lease, evidence examined, and held not to sustain a charge of nuisance resulting from the fact that defendant, while engaged in making ice cream, permitted water to run on the floor and under the building and into the adjoining yard. *Id.* . . . . . 157
4. Lease—Cancellation—Waste—Evidence.—In an action to cancel a lease, evidence examined and held not sufficient to show that defendant had committed a waste by allowing water from the floor to run under the house, resulting in a sunken condition of the house and an adjoining shed. *Id.* . . . . . 157
5. Intoxicating Liquors—Injunction.—Where a landlord is liable to a fine for permitting his property to be unlawfully used for the sale of intoxicating liquors, he has the right to have such illegal use by his tenant restrained by injunction. *Hall v. Smith-McKinney Co.* . . . . . 159
6. Contracts—Section 2295, Kentucky Statutes.—In a suit to recover twelve months' rent from a tenant for continued occupancy after expiration of term, held, that there was such an express contract as to take the case out of Section 2295, Kentucky Statutes. *Hayes v. Nic Adamo Co.* . . . . . 223
7. Lease—Covenant of—When Not An Option.—A clause in a twenty-year lease which provides: "Party of the first part (lessor) is to make an allowance of fifteen hundred dollars (\$1,500.00) out of the first year's rent; said sum to be expended in installing heating plant and in rearranging elevator (in leased premises)," was not a mere option granted the lessee, but a covenant whereby the lessor obligated himself to pay or allow the lessee that sum on the cost of installing the heating plant and rearranging the elevator. *Looms v. Standard Printing Co.* . . . . . 592
8. Obligation Imposed Upon Lessee—What Was a Sufficient Performance of.—As the above clause of the lease failed to fix the time for installing the heating plant and rearranging the elevator, it should be presumed that the parties contemplated that the work would be performed in a reasonable time and before the expiration of the first year of the lease. But where the lessee within a reasonable time and during the first year of the lease, substantially completed the work on the

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elevator and began work on the heating plant in time to have completed it in that year, but was forced into bankruptcy by his creditors before it could be completed; and the leasehold and all rights under the lease, together with other property of the lessee, was sold under the bankruptcy proceedings, and the purchaser at such sale, with the knowledge of the lessor and without objection from him, completed the installation of the heating plant and the little work remaining to be done on the elevator; and in the meantime paid the lessor all rent on the leased premises as it accrued, with the understanding between them that such purchaser would upon the completion of the heating plant, claim and be allowed out of the rent going to the lessor as paid by the latter, the \$1,500.00 on the cost of the elevator and heating plant; the lessor, under these circumstances, was properly held liable for the \$1,500.00, although the installation of the heating plant was not completed until the second year of the lease. *Id.*..... 492

9. Fires—Repairs.—Where there was no express covenant on the part of the tenant to repair the premises or to keep them in repair, and the obligation was to surrender the premises at the end of the term in as good condition and order as they were at the time of the contract, does not impose upon the tenant a liability to repair or restore in the event of destruction of the premises, or a material part of them, during the term, by fire, unless the fire was the result of default or negligence of the tenant. *Bentley v. Ballard & Herring; Bentley, et al v. Same*..... 622
10. Breach of Contract by Tenant—Action by Tenant to Recover Money Paid—Counterclaim.—Where a tenant made a bank deposit of \$270 to secure payment of six months' rent and abandoned the premises at the beginning of his term, and the landlord again took possession in 15 days, in a suit by the tenant to recover the money, and a counterclaim by the landlord for damages in the breach of contract and injury to property, the evidence examined and held that the court did substantial justice in allowing \$100.00 to the landlord and remainder of fund to the tenant. *Chambers v. Slone*..... 680

LARCENY—See Argument of Counsel; Criminal Law.

LAW OF THE CASE—See Appeal; Conflict of Laws.

LEASE—See Landlord and Tenant.

LEGACIES—See Wills.

LEGISLATURE—See Constitutional Law; Statutes.

LEVY—See Execution.

LEWDNESS—See Nuisance.

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**LIBEL AND SLANDER—**

Libel by Servant—When Master Not Liable for.—In an action for damages brought by one of its employes against a corporation for a libel affecting him, written and published by the corporation's bookkeeper, a peremptory instruction directing a verdict for the defendant was properly given, where it was conclusively shown by the evidence that the bookkeeper was not at the time acting in the execution of any authority, express or implied, given him by the corporation, and the act was not within the apparent scope of his employment, or in the furtherance of its business, and was never ratified by the corporation. *Case v. Steele Coal Co.*..... 68

LICENSES—See Corporations.

LIENS—See Judgment; Mechanics' Liens.

LIFE ESTATE—See Wills.

**LIMITATION OF ACTIONS—See Mortgages; Tenancy in Common—**

1. Conveyance by Married Woman—Champerty.—While one is holding land conveyed to him by a married woman by a deed in which her husband did not join, a conveyance made by her of such lands to another, after she becomes discovert, is champertous and void and does not stop the running of the statute of limitation in favor of the one holding the land adversely. *Big Sandy Co. v. Ramey*..... 236
2. Conveyance by Married Woman.—If a married woman ineffectually attempts to convey her lands by the execution and delivering of a deed, in which her husband did not join, and puts the vendee in possession, her right of recovery of the land is barred unless she brings an action within three years after she becomes discovert. *Id.*..... 236
3. Statements or acts of a lienor cannot estop him to claim a lien as against the owner, where the owner was not misled or induced to change his position by the statements or acts. *Taylor, et al. v. Fuller, et al.*..... 563
4. Waiver.—To establish a waiver of a lien, it must clearly appear that the lienor so intended, and that the waiver was based upon a valuable consideration. *Id.*..... 563
5. Computation of Period of Limitation—Commencement of Action by Unauthorized Parties.—The bringing of an action by an administrator under a void appointment does not stop the running of the statute. Unless there is a valid appointment and qualification of an administrator within one year after the death of the intestate no action may be maintained to recover damages for his death. *Fentzka's Admr. v. Warwick Construction Co.*..... 530

**LIQUORS**—See Constitutional Law; Intoxicating Liquors. Page

**LIVE STOCK**—See Carriers; Damages.

**LOCAL OPTION**—See Appeal, 5; Intoxicating Liquors.

**LOOKOUTS**—See Automobiles; Railroads.

**MALICIOUS PROSECUTION**—

1. Probable Cause—Question for Jury.—Whether the facts proven, in attempting to show a probable cause for the prosecution of another, are sufficient to make a probable cause is a question of law, exclusively for the court. *Bruce v. Scully*.... 296
2. Probable Cause—Question for Jury.—If the facts relied upon to show probable cause in a suit of malicious prosecution are disputed, then as to whether or not such facts exist, is a question for the jury under proper instructions. *Id.*..... 297
3. Probable Cause—Burden of Proof.—In a suit for damages for malicious prosecution, the burden of proof is upon the plaintiff to show want of probable cause as well as malice in the defendant, who is charged with instituting the prosecution, upon which the suit is founded. *Id.*..... 297
4. Probable Cause—Question for Jury.—If the evidence for plaintiff shows conclusively from undisputed facts that the defendant had probable cause for the institution against plaintiff of the prosecution complained of, there is no question for the jury, and the court should direct a verdict for the defendant. *Id.* ..... 297

**MANSLAUGHTER**—See Criminal Law.

**MARRIED WOMEN**—See Adverse Possession—Deeds; Limitation of Actions.

**MASTER AND SERVANT**—See Damages; Libel and Slander; Negligence; Personal Injuries—

1. Injury to Servant—Action for Damages—Evidence of Employment.—In an action for damages for personal injuries by an alleged servant against the master, evidence that the master's manager attempted to employ another boy is not competent to show that the manager employed plaintiff or knew he was engaged in doing certain work. *Standard Oil Co. v. Marlow*.... 1
2. Injuries to Servant—Railroads—Collision—Insufficient Rules and Methods of Operation—Negligence.—In an action for damages for the death of an engineer, killed in a wreck alleged to have been caused by defendant's negligence in changing the meeting point without notice to the decedent, and in not having sufficient rules to give proper notice of changes in the meeting points of trains, evidence examined and held in

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- sufficient to sustain the charge of negligence. *Louisville & Nashville Railroad Company v. Heinig's Administratrix*..... 14
3. Injuries to Servant—Railroads—Collision—Negligence of Employees of Waiting Train.—In an action for damages for the death of an engineer resulting from the collision of two trains, evidence examined, and held insufficient to show negligence of the employees of the waiting train in failing to turn the switch, or in stopping the train too near the switch. *Id.*..... 14
  4. Injury to Servant—Railroads—Collision—Topographical Conditions of Meeting Point—Negligence—Evidence.—In an action for damages for the death of an engineer resulting from the collision of two trains, evidence considered and held insufficient to show negligence on the part of the defendant in placing the switch of the passing track where trains were to meet at a place where the view was obscured by an embankment and trees. *Id.*..... 14
  5. Injury to Servant—Railroads—Failure to Adopt Block Signal System—Assumption of Risk.—An engineer of long experience, who has been in the employ of a railroad for a number of years, knows and appreciates the danger growing out of the failure of the company to adopt and have in use the block signal system, and assumes the risk of such danger. *Id.* - ..... 15
  6. Injury to Servant—Railroads—Rules—Contributory Negligence—Federal Employers' Liability Act.—A rule of a railroad company imposing on its conductor the duty of placing himself in a position to hear the meeting point signals, and failing to hear and clearly understand them, to stop his train, is for the benefit not only of passengers but of employees on the train, and the contributory negligence of an employee does not, in an action under the Federal Employers' Liability Act, deprive him of the benefit of the rule where its violation would be negligence as to anyone else on the train. *Id.*..... 15
  7. Injury to Servant—Railroads—Contributory Negligence—Federal Employers' Liability Act.—In an action against a railroad company under the Federal Employers' Liability Act, it is only where the employee's act is the sole cause of the injury, and defendant's act is no part of the causation, that defendant is free from liability under the act. *Id.*..... 15
  8. Injury to Servant—Railroads—Contributory Negligence—Federal Employers' Liability Act.—Though an engineer killed in a collision be guilty of negligence in failing to give a signal of the meeting point of the two trains, and in failing to have his train under control as the meeting point is approached, yet where the rules of the company require the conductor to place himself in a position to hear the meeting point signals, and failing clearly to hear and understand them, to stop his train, a recovery may be had under the Federal Employers'

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- Liability Act if the conductor, in the exercise of ordinary care, could have known that the decedent failed to give the meeting point whistle, or failed to take steps to stop the train, and could have stopped the train in time to avoid the collision. *Id.* ..... 15
9. Injury to Servant—Railroads—Contributory Negligence—Federal Employers' Liability Act—Evidence.—In an action for damages under the Federal Employers' Liability Act, based on the negligence of a conductor in failing to comply with the rules of the company requiring him to place himself in a position to hear the meeting point signals, and failing to hear and understand them, to stop his train, evidence considered, and held sufficient to take the case to the jury. *Id.* .. 15
10. Injury to Servant—Railroads—Federal Employers' Liability Act—Verdict Based on Sufficient and Insufficient Grounds—Prejudicial Error.—Since in an action for damages under the Federal Employers' Liability Act, the amount of the verdict necessarily depends on the amount of negligence attributable to the carrier, a finding based on negligence not authorized by law is prejudicial, even though based also on another and sufficient ground. *Id.*..... 15
11. When Act of Servant Will or Will Not Be Binding Upon the Master.—The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead, for him. If the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by his master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master, as if it were his own. But where the servant steps aside from his employment assuming to act, and does act, solely on his own account in a matter which the master has no more connection with than if he were a complete stranger, it would not be logical or fair to make the master suffer for it, for in doing that act the servant, so called, was absolutely his own master. *Case v. Steele Coal Co.*..... 69
12. Mines—Injury to Miner—Failure of Miner to Comply with Provisions of Statute—Custom of Mine.—Where a miner failed to comply with the provisions of the statute in selecting and marking props, his administratrix cannot recover damages for his death, caused by falling slate, on the theory that the custom of the mine did not require him to select and mark the props. *Palmer's Admx. v. Empire Coal Co.*..... 130
13. Liability of Master for Injury to Servant in Going from His Work.—Where an employe of a railroad company was killed by the negligence of his employer while he was walking, at the end of the day's work, on premises of the company, to

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- boarding cars owned by it in which he boarded, a right of action arose in behalf of his administrator under the Federal Employers' Liability Act to recover damages for his death. *L. & N. R. Co. v. Walker's Admr.*..... 210
14. Negligence.—While an employe of a railroad company was going from his work to boarding cars of the company and for this purpose was walking across a trestle from which he was knocked by a piece of timber projecting from a push-car operated by other employes of the company, the company was properly held liable in damages for the negligent manner in which the operators of the push-car loaded on it the timber and for their negligence in failing to give the employe who was killed warning of its approach. *Id.*..... 210
15. Negligence.—A master is not responsible for injuries to an employe caused by the ordinary negligence of a superior employe, but is responsible for such injuries to a subordinate caused by the gross negligence of a superior. *Burton Construction Co. v. Metcalfe* ..... 366
16. Negligence—Exemplary Damages.—The servant cannot recover exemplary damages against a master for an injury caused by even the gross negligence of a superior employe, but may recover compensatory damages on account of injuries resulting from gross negligence of a superior employe. *Id.* .. 366
17. Negligence.—The master is not responsible for injuries resulting to a servant, and which were caused by the negligence, either ordinary or gross, of a fellow servant in the same class with himself, and engaged in the same field of labor. *Id.*..... 366
18. Damages—Negligence.—An act done by a servant in the immediate presence of a superior, and by the command of a superior, is the act of the superior, and the master is responsible for the damages resulting from such act, if it be an act of gross negligence on the part of the superior employe. *Id.* .. 366
19. Assumption of Risk.—While a servant in engaging in work for a master assumes all the risks and dangers incidental to the work in which he is engaged, he does not assume the hazards and dangers resulting from the negligence of the master, or the gross negligence of his superior servant in authority, in the conduct of the work. *Id.*..... 366
20. Assumed Risk.—The doctrine of assumed risk arises out of the contractual relations between the master and servant, and it cannot be presumed that the servant contracts to risk the hazards and dangers to himself, arising from the gross negligence of a superior, or the negligence of the master. *Id.*... 366
21. Assumed Risk.—As a general rule when the danger is obvious the servant who appreciates the condition assumes the risk of any injury that may happen to him, but when the



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- servant does not know of the danger and it is not so obvious as to put a person of ordinary prudence on notice, the master will be liable if the servant, while exercising ordinary care for his own safety, is injured by the failure of the master to furnish him a reasonably safe place in which to work. *Andrews Steel Co. v. Myers*..... 418
22. When Master Not Liable For Injury to Servant.—A competent and experienced laborer employed to put a tile roof on a house, the danger of doing which is obvious and therefore bound to be known to him, cannot, if injured by falling from the building while engaged in such work, recover damages of the master for such injury. Especially is this true where the injured employe is possessed of sufficient skill and experience to be placed in charge of the work. *Dalsey v. Wagner & Co.*..... 554
23. Doctrine of Safe Place—Where Not Applicable.—When the servant, by reason of his skill and experience, is put in charge of the work of putting on a roof, the rule that his master must use ordinary care to provide him a safe place to work has no application. As the danger of performing such work is open and obvious, the servant must protect himself against it, and he assumes such risks as are ordinarily incident to such work, and is charged with the duty of inspection and also left to his judgment as to the manner of doing the work. *Id.*..... 555
24. Petition—Failure to State a Cause—Demurrer to—When Fatal.—Where, as in this case, the facts stated in the petition show that the injuries sustained by the employe were not caused by the negligence of the master, the latter's demurrer to the petition was properly sustained. *Id.*..... 555

MATERIALITY—See Insurance.

MEASURE OF DAMAGES—See Employers' Liability Act.

MECHANICS' LIENS—See Assignments; Principal and Surety—

1. Defective Construction—Evidence.—In an action to enforce a mechanics' lien, evidence examined, and held that the work for which plaintiffs claimed a lien was not properly done, and they were therefore not entitled to a lien. *Apseloff Brothers v. Hyman, &c.*..... 541
2. Statutory Notice of Intention to Claim Lien—Time.—Where the principal contractor abandons his contract, and the sub-contractors are told by the owner to go on and complete the work, the time for giving the statutory notice of an intention to claim a lien should date, not from the time the last item was furnished while the contractor was in charge, but from the time the last item was furnished after the owner directed

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- the sub-contractors to go ahead and complete the work. National Surety Co. v. Price..... 632
3. Credit.—It is not error to credit a sub-contractor by the amount of a note executed by the principal contractor to him, and discounted by a bank, though the note still be held by the bank, where it appears that the contractor is insolvent and the sub-contractor will have to pay the note. Id..... 632
4. Notice of Intention to Claim Lien—Additional Work—Extension of Time.—Where additional work or material is not only required by the contract, but is furnished at the request of the owner, it will extend the time for giving the statutory notice of an intention to claim a lien. Id..... 632
5. Notice of Intention to Claim Lien—Sufficiency.—A notice which falls to state the amount for which a mechanics' lien will be claimed is insufficient. Id..... 632
6. Personal Judgment—Evidence.—Where a sub-contractor claimed a personal judgment against the owner on the ground that the owner made a binding promise to pay, evidence considered, and held that the chancellor did not err in holding that no such promise was made. Id..... 632

**MENTAL CAPACITY—See Deeds.****MERGER—See Judgment.****MINERALS—See Adverse Possession.****MINES—See Master and Servant, 12—**

Provisions of Statute—May Not Be Changed by Custom.—The provisions of the statute relating to mines may not be changed by custom so as to impose on the mine owner liability by reason of such custom, when, as a matter of fact, the statute itself is not complied with. *Palmer's Admx. v. Empire Coal Co.* ..... 130

**MISJOINDER—See Action.****MISREPRESENTATION—See Insurance.****MISTAKE—See Deeds; Husband and Wife.****MONUMENTS—See Municipal Corporations, 11.****MORTGAGES—**

1. Deed Absolute on its Face—Parol Evidence.—In the absence of an allegation of fraud or mistake, parol testimony is admissible to show that a deed absolute on its face was executed to secure a debt, and is therefore a mortgage. *Castillo v. McBeath* ..... 332

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2. When Conveyance Declared Mortgage—Doubt.—When a doubt exists as to whether a conveyance is a deed or a mortgage, that doubt will be resolved in favor of the debtor, and the conveyance construed to be a mortgage. *Id.*..... 382
3. Deed—Construction—Evidence.—A mortgagor of a two-ninths interest in a tract of land, being unable to pay the debt when due, executed to the mortgagee a deed conveying the absolute title to all of the land, and at the same time executed a collateral agreement providing for the redemption of the land within six months upon payment of the debt and interest, the mortgagor remaining in possession. Held, under the evidence, that the chancellor properly adjudged the deed a mortgage. *Id.* ..... 382
4. Purpose May Be Shown—Indemnity.—A mortgage, in the usual form, purporting to secure the payment of a sum certain, may be shown to have been given only for the purpose of indemnifying the mortgagee against loss. *Allen v. Shepherd*... 750
5. Definition of Mortgage.—A mortgage is a security incident to the legal obligation to pay; and, whenever the obligation ceases, the security must cease with it, since there can be no security for a debt which has no legal existence. *Id.*..... 750
6. Security for Debt.—A mortgage may be so drawn as to contain an independent agreement, which absorbs the original contract; but, in the usual form, a mortgage is simply a collateral undertaking, and is a mere security for the debt. *Id.*..... 750
7. Limitation of Action—Contracts.—If an action could be brought and recovery had upon a mortgage as a substantive agreement, the statute of limitations applicable to written contracts applies; but if it could not be so declared upon and a recovery had, it comes within the five years' statute of "contracts not in writing," and the right of recovery is barred after five years. *Id.* ..... 750

## MUNICIPAL CORPORATIONS—See Bonds—

1. Cities of Sixth Class—Street Improvements—Assessment of Costs—Authority of Board of Trustees—Section 3706, Kentucky Statutes.—Since Section 3706, Kentucky Statutes, authorizing the original improvements of streets in cities of the sixth class at the cost of the abutting property owner, does not provide that payment therefor, when the ten year bond plan is not adopted, shall be made in cash, it is within the power of the board of trustees to contract for the work either on a cash basis or a deferred payment plan, and it is no defense to an action by a contractor to enforce a lien for such improvements that a bid was accepted on a deferred payment plan. *Morgan v. Figg*..... 5
2. Cities of Sixth Class—Improvement of Streets—Lien on Abutting Property—Section 3706, Kentucky Statutes.—Under Sec-

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- tion 3706, Kentucky Statutes, street improvement assessments are secured by a lien on the abutting property, whether made on the ten year bond plan or otherwise. Id..... 5
3. City of Sixth Class—Indebtedness—Election to Incur.—In order for a municipality of the sixth class to incur an indebtedness for a public lighting system under a vote of the people, notice of an election for that purpose must be given as required by Section 3705 of the Kentucky Statutes, stating the purpose of the election, the amount of money necessary to be raised annually by taxation for an interest and sinking fund to pay the proposed indebtedness. *Barry v. Town of New Haven* .. 60
4. Creation of Indebtedness.—Notice of Election.—A notice of an election under Section 3705 of the Kentucky Statutes by a municipality of the sixth class to incur an indebtedness for a public lighting system, which states the amount of the indebtedness proposed to be incurred, the purpose of the same, and which specifies "the amount necessary to be raised annually by taxation for sinking fund will be \$400.00, and the amount of money necessary to be raised annually for interest will be \$225.00 for the first year, and \$20 less each subsequent year," is sufficiently specific to satisfy the statute. Id... 61
5. Election Upon Bond Issue—Validity of Election.—Where four or five legal voters voted in a general election for United States Senator and other officers, and left the voting place, and afterwards returned to the voting place and voted in an election upon a proposed bond issue by the town, the action upon the part of the voters and the officers of the election was irregular, but did not invalidate the election upon the bond issue. Id. .... 61
6. Creation of Indebtedness.—In determining whether or not the proposed indebtedness to be incurred by a municipality for a lighting plant will exceed the constitutional limit of three per cent of the taxable property of the town, the probable cost of maintaining and operating the lighting plant in the future cannot enter into the question; the constitutional prohibition contemplates a present and not a future indebtedness. Id. .. 61
7. Town Trustees—Quorum.—A majority of a quorum of a board of town trustees is sufficient to take action unless there be some other rule established by the constitution or the charter. Id. .... 61
8. Ordinances—When Not Measures for Raising Revenue.—Ordinances originating in the board of aldermen of a city of the second class, one ordering an election to determine whether an indebtedness should be incurred by the city and its bonds to that amount issued, for a necessary municipal improvement, naming the amount of such indebtedness and the amount

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- to be raised annually by taxation to pay interest on the bonds and creates a sinking fund to retire them at maturity; the other passed after the election, declaring the result, directing the issuance of the bonds and ordering the general council to thereafter levy and collect annually a tax sufficient to pay the interest on the bonds and create a sinking fund for their retirement, are not measures for raising revenue in the meaning of Section 3060, Kentucky Statutes. Consequently, it was not necessary that they first be introduced in and passed by the city's board of councilmen, as required by its provisions. *Central Construction Co. v. City of Lexington*..... 286
9. Ordinances for Raising Revenue—What Are.—Ordinances of a city providing merely for the incurring of an indebtedness are not measures for raising revenue, as the indebtedness is to be paid in the future by the levy and collection of taxes to be thereafter fixed and imposed by subsequent ordinances. Bills or ordinances for raising revenue are confined to such as levy taxes in the strict sense of the word and do not embrace bills or ordinances for other purposes, which incidentally create revenue. *Id.*..... 287
10. Publication of Ordinance as Notice for Election—What Publication of Notice Insufficient.—Where a statute providing for the holding of an election to determine whether an indebtedness shall be incurred by a city of the second class, declares that it shall be done by publication, in the official newspaper of the city, of the ordinance calling the election and that "such ordinance shall be published for at least two weeks just preceding the election," its publication for only nine days just preceding the election will be fatal to the validity of the election. The requirement as to notice being mandatory, whether its language "at least two weeks just preceding the election" be construed to mean each of the two weeks, running from Sunday to Saturday, inclusive, next preceding the week in which the election is held, or fourteen days just preceding the election and including the day thereof, under neither computation was there a sufficient publication of the ordinance in this case. *Id.*..... 287
11. Territorial Limits—Monuments and Lines.—Monuments and plain lines of location must generally, in determining the extent of territorial limits, prevail over any mere acts of user or attempted jurisdiction by the municipal authorities. *Commonwealth v. Stahr*..... 388
12. Boundary of City.—The corporate boundary of a city cannot be extended or altered by officers or employees of the city performing work or doing other acts outside of the city's corporate limits. *Id.*..... 389
13. Act Through Officers.—A city can only act through its officers, and those officers cannot bind the city, unless author-

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- ized or directed by law. *Bankers Surety Co. v. City of Newport* ..... 473
14. Officers.—For the reason that municipal corporations and their officials are not *sui juris*, they have no authority to take an obligation from a surety of any official for any failure less than a faithful discharge of the duties of the office, nor the right to impose by contract any duties on other officials, so that a breach of such added duties would avoid the bond. *Id.* ..... 473
15. Roads—Street—Municipality—Duty to Maintain as Street, County Road in Town Limits.—Where a county road is taken into a town by the extension of the town limits or the creation of the town, it becomes one of the public ways of the town and it is the duty of the town to maintain it as a street as long as it is kept open by the town as a public way. If the town desires to relieve itself of the obligation to maintain this public way as a street it may by appropriate action reduce the town limits and thereby recommit to the care of the county as one of the public roads so much of it as lies outside the town limits; or it may be closed as a public way of the town unless it is necessary to enable the people of the county to go to and from the public buildings of the county situated in the town. *Letcher County v. Town of Whitesburg* ..... 604
16. Ordinances—Uncertainty.—An ordinance of a town prescribing a punishment for its violation, must be sufficiently certain as to the portion of the town where it is intended to be in force, that persons may know certainly when they have violated it, or else it is void for want of certainty. *C. & O. R. Co. v. Mellon, Police Judge*..... 738
17. Cities of Second Class—Construction of Sewer—Tax—Ordinance Declaring Improvement a Necessity—Acts 1910, Chapter 53.—While it is not necessary, under Chapter 53 of the Acts of 1910, for a city of the second class to pass an ordinance or resolution fixing and determining in advance the amount of tax to be levied upon the lots benefited by the proposed construction of a sewer, yet it is necessary that a preliminary resolution or ordinance, declaring the construction of the proposed sewer to be a necessity, and setting out in general terms the property subject to the payment of the cost of the same, shall be passed before any ordinance for the construction of the sewer shall be passed. *City of Newport, &c. v. Lang*..... 752
18. Street Improvements—Assessment for.—The council had the power to adopt an ordinance providing for the improvement of Barney Avenue from Park Boundary Road to Alta Avenue, extending back a depth of 378 feet, the work to be done at the cost of the owners of the ground within the boundary, al-

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though a part of the boundary was outside of a line drawn at right angles from the intersection of Barney Avenue with Park Boundary Road. *Englehard v. Ky. & Ind. Con. Co.*... 774

MURDER—See Criminal Law; Homicide; New Trial.

NAMES—See Business.

NEGLIGENCE—See Agency; Animals; Automobiles; Carriers; Employers' Liability Act; Master and Servant; Personal Injuries; Railroads—

1. Where guard rails to a bridge or its approaches are clearly necessary for the safety of travelers, a failure to erect or properly maintain them is actionable negligence. *C., N. O. & T. P. R. Co. v. Dungan*..... 36
2. Pleading.—While negligence may be pleaded in general terms, yet where plaintiff specifies the negligence on which he relies, his recovery is limited to such negligence. *Palmer's Admx. v. Empire Coal Co.*..... 130
3. Under a general allegation of negligence, any negligence may be shown; but where specific acts of negligence are relied upon, they must be proved as alleged to sustain a recovery. *L. & N. R. Co. v. Mitchell*..... 254
4. Actionable Negligence—Proximate Cause.—In an action by appellee to recover damages for injuries sustained by her through the negligence of the appellant's agent in putting, or by mistake permitting her to enter an automobile not owned or controlled by appellant, from which she was thrown by the negligence of the chauffeur; as her evidence conduced to prove that her injuries were received as stated, in either event the jury, if they believed appellee's witnesses, were authorized to find that the negligence of appellant's agent was the proximate cause of her injuries. For the latter's negligence, after selling her a ticket entitling her to ride in an automobile to her home, in putting appellee in the wrong machine, or not informing her of taking the wrong machine, if he knew it, concurring with that of the chauffeur in letting the machine escape, produced the injuries, responsibility for both being upon appellant. It is a well settled rule that the master is liable for injuries of which his servant's negligence is the proximate cause, though the negligence of a third party contributed to cause the injuries. *Denker Transfer Co. v. Pugh*..... 818

NEGOTIABLE INSTRUMENTS—See Banks.

NEWLY DISCOVERED EVIDENCE—See Trial.

NEW TRIAL—See Criminal Law; Judgment; Trial—

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1. Capital Offense—Trial for—Separation of Jury—When Ground for New Trial.—Where on the trial of the accused under an indictment for murder, the officer in charge of the jury left eleven of them at night, unattended and unguarded from intrusion, in the room of the house where they were boarded, and took the twelfth juror to a drug store two or three hundred yards distant, and permitted him to remain there long enough to purchase and eat ice cream, before returning with him to the eleven jurors at the boarding house; and on yet another occasion, in conducting the jury to their boarding house, during a recess of the court, permitted a juror to straggle at a distance of eight feet behind the other eleven and hold a conversation with an outsider, not in the presence or hearing of the officer, these derelictions of duty on the part of the latter caused such a separation of the jury as to entitle the accused to a new trial. *Campbell v. Commonwealth* ..... 106
2. Opportunity for Interference With Jury—What Commonwealth Must Show.—Where a separation of the jury has been allowed by the officer in charge of them, the court, trying the case, cannot afford to speculate as to what might or might not have been done by evilly disposed persons to improperly influence the verdict of the jury. In such case it devolves upon the Commonwealth to show that such separation gave no opportunity for the exercise of improper influences on them. *Id.* ..... 106
3. When Incompetent Evidence Ground For.—The prejudicial effect resulting to the defendant from the introduction of the books in question being manifest, the refusal of the circuit court to grant it a new trial by reason thereof requires the reversal of the judgment. *Louisville Railway Co. v. Kritsky* 652

NON-RESIDENCE—See Attachment; Judgment.

NOTES—See Judgment.

NOTICE—See Automobiles; Insurance; Mechanics' Liens; Municipal Corporations; Principal and Surety; Public Service Corporations.

NUISANCE—See Landlord and Tenant.

1. Adulterous Relation—Acts Proving Existence of—How Shown.—Where, with the knowledge generally of other people of the neighborhood, a man and woman not legally sustaining to each other the relation of husband and wife, and conclusively shown to be of bad reputation for chastity, together occupied the same house for seven months, and, according to the evidence, acted at times in such a lewd and vulgar manner as to indicate that they were living in adultery, such conduct con-



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stituted a common or public nuisance in the meaning of the law. *Adams v. Commonwealth* ..... 76

2. What Will Constitute.—A nuisance per se is any act, or omission or use of property or thing, which is of itself hurtful to the health, tranquillity or morals, or outrages the decency of the community. Open and gross lewdness, or whatever openly outrages decency and is injurious to public morals is a misdemeanor and indictable at common law. Thus the living together of a man and woman unmarried, which is generally known throughout the neighborhood, is sufficient to constitute open and notorious lewdness, without proving it to have been in a street or under the immediate observation of strangers. In such case outward indecency is not a necessary element. *Id.* 77

OBSTRUCTION—See Easements.

OCCUPATION—See Domicile.

OFFICERS—See Bonds; Corporations; Municipal Corporations—

1. Salary of County Officer—Duty of Fiscal Court.—Where the salary of a county officer is to be paid by a county, it is the duty of the Fiscal Court to fix the salary of such officer for each year of his term, by a general order made previous to his election. *Fox v. Lantrip*..... 178
2. Salary of County Officer.—If the Fiscal Court fails to fix the salary of an officer before his election to the term, it can do so by an order made after his election, or qualification. *Id.*.... 178
3. Where Salary of County Officer Is Not Fixed Before His Term—Power of Fiscal Court—Gross Sum Allowed.—Where the fiscal court has failed to fix the salary of a county officer before his election, by a general order, and for the first year of his service allowed him a gross sum, a like sum will be considered his salary for each of the years of his term thereafter, and the fiscal court has no power to increase or lessen it for any of the succeeding years of his term, provided such sum is within the maximum and minimum amounts provided by law. *Id.* ..... 178
4. To Ascertain Salary of School Superintendent, Where Gross Sum Is Allowed for First Year.—Where there has been no order made by the fiscal court fixing the salary of the County Superintendent of Schools before his election, and he is allowed by said court a gross sum for the first year's service of his term, the gross sum divided by the number of pupil children reported by the census in the county, will ascertain the amount per capita for each pupil child, and will be a basis upon which to ascertain his salary for the succeeding years of his term. *Id.*..... 178

OMITTED PROPERTY—See Taxation.

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**OPTIONS**—See Landlord and Tenant.

**ORDERS**—See Fiscal Courts.

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**PAROL CONTRACTS**—See Contracts.

**PAROL EVIDENCE**—See Mortgages.

**PAROL TRUSTS**—See Trusts.

**PARTIES**—See Appeal; Contracts; Deeds; Partition; Pleading.

**PARTITION**—See Tenancy in Common—

Actions for Partition—Proceedings and Relief—Parties.—A valid partition of land may not be had unless all the tenants in common are before the court when the decree is rendered. *Burchett v. Clark* ..... 536

**PARTNERSHIP**—See Contracts—

Insolvent Partnership—Attachment Against Property of—Fraud in Obtaining—How Attached Property Should Be Disposed of.—Where, in an action against an insolvent partnership and the members of the firm, an attachment was levied upon the partnership property for an alleged debt sued on by the plaintiffs, and it was made to appear from the evidence that the plaintiffs were not, in fact, bona fide creditors, but silent partners in or part owners of the business and property of the defendant partnership, and that the action was brought and attachment procured for the purpose of defrauding actual creditors of the latter, the judgment of the circuit court dismissing the action and attachment of the plaintiffs, and applying the proceeds of the attached property to the payment of the debts of other attaching bona fide creditors of the partnership, according to priority, properly determined the rights of the parties. *Josselson Bros. v. Butler & Lipsitz*. 239

**PASSENGERS**—See Carriers; Railroads; Street Railroads; Verdict.

**PASSWAY**—See Easements.

**PATENTS**—

Boundaries.—Where established lines are called for in a clear way, and where to follow or go to them, would do no violence to other surveys, then in order to locate a line as intended by the patentee, the court will consider the established lines called for in the patent as controlling. *Rock Creek Property Co. v. Hill* ..... 324

PAYMENT—See Taxation.

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PEDESTRIAN—See Automobiles; Street Railroads.

PERFORMANCE—See Landlord and Tenant.

**PERJURY—**

1. Trial Under Indictment for—Instructions.—On the trial of one indicted for false swearing, it was error in the court to fail to instruct the jury that before they could convict the accused his guilt must be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances. *Walker, et al. v. Commonwealth* 111
2. Indictment for—Improper Joinder.—False swearing or perjury is not an offense for which two or more persons can be jointly indicted. The offense can only be committed by an individual in his individual capacity. The crime being distinct, several persons cannot be joined, only one can be made defendant. *Id.* ..... 111

PERSONAL INJURIES—See Conflict of Law; Damages; Landlord and Tenant; Master and Servant; Negligence; Railroads—

1. In a suit to recover for personal injury, the financial circumstance of either party is not a matter for consideration, and it was not error to refuse to admit evidence of the financial ability of the injured party to endure the loss. *Andonique v. Carmen* ..... 154
2. Action for—When Question of Negligence one for the Jury.—Where, in an action to recover damages for personal injuries sustained by the plaintiff, there were but two witnesses testifying, the plaintiff's testimony being to the effect that upon his falling to grasp the handle bar of a street car, his injuries were caused by the act of the conductor in catching and holding him by the arm, thereby compelling him to run with the car and when released by the conductor to fall and break his leg; and the testimony of the remaining witness being to the effect that the conductor did not catch or hold plaintiff until after he had grasped the car and failed to let it go when commanded by the conductor to do so, and that plaintiff's injuries were caused alone by his holding to and being dragged and thrown by the car; the refusal of the trial court to submit to the decision of the jury the question whether plaintiff's injuries were caused by the negligence of the conductor or by his own negligence, was error. *Jonas v. South Cov. & Cin. St. Ry. Co.* ..... 171
3. Proximate Cause—When Question for Jury.—It is a well settled rule of law that what is the proximate cause of the injury is ordinarily a question for the jury; and before the court can take it away from the jury and determine it, the

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- facts must be such that fair-minded men ought not to differ about them. *Denker Transfer Co. v. Pugh*..... 819
4. Action for—Verdict.—Where one was suffering the consequences of an injury received five years before, but not to the extent of incapacitating him from service or lessening his power to earn money, and he received another injury from his master's negligence, which permanently and greatly aggravated the consequences of the first injury, and wholly incapacitated him from service, rendering him dull and stupid, impairing his powers of speech and faculties of sight, hearing, and feeling, incurred medical expense of \$100, and lost \$400 in time, a verdict of \$2,500 is not excessive. *L. & N. R. Co. v. Winkler* ..... 844

PERSONAL REPRESENTATIVES—See Executors and Administrators; Guardian and Ward.

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PLEADING—See Carriers; Conflict of Laws; Ejectment; Insurance; Judgment; Jurisdiction; Negligence—

1. Discretion of Trial Court.—The only limitation upon the discretion of the trial court in allowing pleadings to be filed is that they must be in furtherance of justice, and must not change substantially the claim or defense. *C., N. O. & T. P. R. Co. v. Dungan* ..... 36
2. Filing Service and Withdrawal—Computation of Time.—Where defendants were given until the twenty-second day of the term to file their answer, and they tendered it on the twenty-second day, they were in time. *Combs v. Frick Co.*..... 42
3. Set-off and Counter-claim—Unliquidated Damages.—Where plaintiff, a foreign corporation having no property in this State, brings an action upon notes given for machinery sold by it, the purchasers may interpose by way of recoupment a demand for unliquidated damages arising out of the transaction in question. *Id.* ..... 42
4. Motions—Striking Out Pleading or Defense.—Where defendants having failed to file their answer within the time prescribed by the Code, were put upon terms, and thereafter tendered and filed an answer which was insufficient, the court had power to strike it from the record. *Id.*..... 42
5. Evidence—Trial.—In an action for damages for the death of a coal miner caused by falling slate, under an allegation of the failure of the defendant itself to prop the roof where decedent was working, and of its failure to furnish decedent a reasonably safe place to work, evidence of defendant's failure to furnish decedent sufficient props and caps to support the roof was not admissible; and where this issue was submitted

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- to the jury, the trial court properly granted a new trial. *Palmer's Admx. v. Empire Coal Co.*..... 130
6. Answer and Counter-claim—Caption.—An answer and counter-claim should be so denominated in the caption, but if the opposing party joins issue upon it, without objection, the defect is waived, and if the pleadings state facts constituting it a counter-claim, it will be considered, although it is not so denominated in the caption. *Cherry v. Cherry*..... 246
7. Demurrer.—A demurrer to a petition cannot enlarge the allegations of the petition by reciting extraneous facts in the demurrer. *L. & N. R. Co. v. Mitchell*..... 254
8. Amendments—Substitution of Parties.—Where an action to recover damages for the death of an intestate is brought by an administrator acting under a void appointment, there is no suit in court, and nothing to amend; hence the trial court properly refused to permit to be filed an amended petition tendered and offered by the administrator after he had obtained a second and valid appointment, after the expiration of more than a year after the death of intestate. *Fentzka's Admr. v. Warwick Construction Co.*..... 580
9. Contracts.—If a party desires to rely on a written contract to support his action he should set it up in his pleading. *Thompson v. Eversole* ..... 836

PLEDGE—See Judgment, 10.

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POSSESSION—See Adverse Possession; Deeds; Ejectment; Forcible Entry and Detainer; Wills.

PRACTICE—See Action; Trial.

PRINCIPAL AND AGENT—See Agency—

1. Secret Instructions—Effect as to Third Party.—Secret or private instructions to an agent, however binding they may be as between the principal and agent, can have no effect on a third person who deals with the agent in ignorance of the instructions, and in reliance on the apparent authority with which the principal has clothed him. *Stallings v. Carpenter*.... 711
2. The Relation—Estoppel to Deny Agency.—Where one by want of ordinary care, induces a third person to believe that another is his agent, although such ostensible agent is not so in fact, such one is bound by the acts of the apparent or ostensible agent; liability arises for the acts of such ostensible agent not because he is an agent in fact, but because the principal will not be heard to deny the agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent upon the faith of his apparent and ostensible authority. *Roberts v. Akers* ..... 840

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1. Contractor's Bond—Notice of Claims Unpaid.—Where in a contractor's bond the obligee is required to withhold payments from the contractor, and to notify the obligor, after he has notice or knowledge of the fact that any claim for labor performed or for materials or supplies furnished the contractor "remains unpaid," the words "remains unpaid" apply only to claims where payment has been demanded and either refused or neglected for an unreasonable length of time. *National Surety Company, &c. v. Price, &c.*..... 632
2. Contractor's Bond—Notice of Claims Unpaid—Evidence.—In an action on a contractor's bond requiring the obligee to withhold payments to the contractor, and notify the obligor, after he has notice or knowledge of the fact that any claim for labor performed or for materials or supplies furnished the contractor remains unpaid, evidence examined, and held that the obligee did not pay out money, or fail to notify the obligor within a reasonable time after having notice or knowledge of the fact that certain claims of the sub-contractors remained unpaid. *Id.* ..... 632
3. Contractor's Bond—Attorneys' Fees.—Where a contract between the owner and the principal contractor provides "that the contractor shall refund to the owner all money that the latter may be compelled to pay in discharging any liens on said premises made obligatory in consequence of the contractor's default," a bond executed by a surety company guaranteeing the faithful performance of the contract by the contractor does not cover attorney's fees incurred in resisting mechanics' liens. *Id.* ..... 632

PROBABLE CAUSE—See Malicious Prosecution.

PROCESS—See Husband and Wife, 1; Judgment, 7, 8, 11, 12—

Requisites and Validity of Warning Order.—Although Section 57 of the Civil Code permits a corporation having no agent in the State known to plaintiff to be proceeded against by warning order, yet in view of Section 571, Kentucky Statutes, requiring all corporations to designate a process agent and to keep an office in this State wherein a process agent may be found, the plaintiff may not use his ignorance as a refuge and shut his eyes to the truth, and refrain from inquiring of the Secretary of State whether the corporation has designated a process agent, and in good faith, make affidavit that the corporation has no agent in the State known to him. *Commonwealth Land & Lumber Co. v. Smith* ..... 140

PROFITS—See Rent.

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**PROXIMATE CAUSE**—See Negligence; Personal Injuries.

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**PUBLIC SERVICE CORPORATIONS—**

1. **Water Companies—Notice.**—In the case of a public service water company it is a reasonable rule to refuse service if, after notice, a water bill remains unpaid. In such event, however, it is liable in damages if the bill rendered is unjust or erroneous. *Louisville Tobacco Warehouse Company v. Louisville Water Company* ..... 478
2. **Deprivation of Service—Damages.**—The consumer deprived of service for non-payment is not entitled to recover damages, if the bill rendered was just and correct although he may have refused payment because he in good faith believed it was unjust and exorbitant. *Id.*..... 478
3. **Water Companies—Evidence.**—It was not prejudicial error for the court to reject as evidence certain receipted water bills, when their effect was only cumulative, and they could have demonstrated nothing more than certain facts already established and virtually admitted as true. *Id.* ..... 478

**PUNISHMENT**—See Contempt.

**QUESTION OF FACT**—See Appeal.

**QUESTION FOR JURY**—See Animals; Malicious Prosecution; Personal Injury; Railroads; Street Railroads; Trial.

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**RAILROADS**—See Carriers; Conflict of Laws; Damages, 2, 7, 8; Master and Servant; Verdict—

1. **Crossing Accident—Right of Traveler at Private Crossing to Depend on Signals for a Public Crossing.**—Persons using a private crossing who are in the habit of depending upon signals required to be given for a nearby public crossing are entitled to the benefit and protection of such signals, and if the company fails to give the public crossing signals and the traveler at the private crossing is injured as a result thereof, he may recover damages. *Thacker v. Norfolk & Western Railway Co.* ..... 387
2. **Action for Personal Injuries—Signals.**—In a suit to recover of a railroad company for personal injury occasioned by being struck by a train while standing on its station platform, if the jury believed from the evidence that the platform was an unusually dangerous one, under the circumstances, it was the duty of the company to use some effective means other than

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- the statutory signals to warn those on the platform of the approach of its train. *L. & N. R. R. Co. v. Kenney's Admr.*..... 403
3. Negligence—Question for Jury.—It is a question for the jury as to whether the defendant was guilty of such contributory negligence as to preclude a recovery. *Id.*..... 403
  4. Fires—Instructions.—An instruction telling the jury that "they should find for the plaintiff if they believed from the evidence, either, that said engine was not equipped with the best or most approved screen or spark-arrester in practical use and in perfect order, or that the engine in question was operated by defendant's agents, servants and employes in a careless and negligent manner, and thereby sparks from said engine were thrown upon the house which was burned, and set it upon fire and destroyed it," was not objectionable. *I. C. R. Co. v. Scheible* ..... 469
  5. Fires—Evidence.—Direct evidence is not indispensable to a recovery in this class of cases. Circumstantial evidence is equally as sufficient as direct evidence would be when the circumstantial evidence connects the sparks from the passing train with the fire. *Id.* ..... 469
  6. Trespassers Upon Tracks.—One is not licensed to travel longitudinally upon a railroad track, because the public road nearby has been obstructed, either by the railroad company, or some other person, and is thereby made inconvenient to travel. The employees of the railroad company are not required to anticipate the presence of persons upon the track of the railroad, except at public crossings, and in populous communities, like cities and villages. *L. & N. R. Co. and Wasloto & Black Mtn. R. Co. v. Davis.*..... 572
  7. Trespassers Upon Tracks—Lookout Duty.—The employees of the railroad company do not owe a trespasser any lookout duty, and only owe him the humane duty of using ordinary care to prevent doing him injury, after they shall have discovered his peril. *Id.* ..... 572
  8. Youth Fourteen Years Old Riding on Freight Train—Assisting in Unloading Light Freight.—It is neither intrinsically hazardous or obviously dangerous for a youth fourteen years of age to assist in unloading light freight from a freight car and placing it on depot platform; nor is it necessarily hazardous or dangerous for such youth to ride on the caboose of a freight train or to be permitted to do so. *C. & O. R. Co. v. Smith* ..... 747
  9. Injury to Youth in Riding on Freight Train—Action for Damages—Peremptory Instruction.—In an action for damages for injuries to a boy fourteen years old resulting from his becoming frightened and jumping from a caboose of a freight train upon which the conductor was permitting him to ride under his agreement to assist in unloading light freight, the



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- injury to the boy occurring while he was not engaged in handling freight and his riding on the caboose not being necessarily hazardous or dangerous, there should have been a peremptory instruction to find for defendant. *Id.*..... 748
10. Action for Personal Injuries—Negligence.—Where a conductor on a freight train was injured while in the performance of his duties through the negligence of a brakeman, who, in the absence of the conductor, coupled onto the train a car with a defective draw-head, the negligence of the brakeman was not attributable to the conductor, although the conductor was superior in authority to the brakeman. *L. & N. R. Co. v. Winkler* ..... 843
11. Employers' Liability Act.—Where there is evidence conducing to support the averments of the petition constituting grounds of action relied on for recovery, although the weight of the evidence, both numerically and in probative value, may be with the defendant, the evidence is sufficient to sustain the verdict of the jury, although the case is laid and practiced under the Federal Employers' Liability Act. *Id.*..... 843
12. Contributory Negligence—Inspection.—Where the conductor in the line of his duty was elsewhere engaged, it can not be said that he was guilty of contributory negligence in not being present at the time a defective car was coupled onto the train, or in not personally inspecting the car before it was coupled. *Id.* ..... 843

RAPE—See Criminal Law, 4.

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RENT—See Landlord and Tenant—

What Profits Included—Royalties From Mines.—Where a grantor conveyed land to his sons, and provided that his wife should "receive one-half of all rents from off the place, from all resources whatsoever," this provision held to include royalties from mines. *Saulsberry v. Saulsberry*..... 486

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SAFE PLACE TO WORK—See Master and Servant.	
SALARIES—See Schools and School Districts; Officers.	
SALES—See Contracts; Execution—	

1. Delivery—What Constitutes—Instruction.—An instruction "That, in law, there is a delivery of property by a seller to a purchaser when the seller places the property at the disposal of the purchaser and relinquishes to the purchaser the control and right of control of, or dominion over, the property and the purchaser takes, or accepts, the control and right of control, or dominion, over the property," correctly defined delivery, although there might have been added to it the words, "Acceptance need not be by words but may be by act or acts of the purchaser." *Kentucky Motor Car Co. v. Darenkamp* ..... 219
2. Of Personal Property—Rights and Remedies of Purchaser After Delivery in Case of Disagreement as to Contract.—When no definite contract has been made for the sale of personal property and there is disagreement between the seller and the buyer as to the terms of the contract pending which the property is delivered, the buyer has the right to reject it or to accept and use it as he intended, but if he adopts this latter course with knowledge of the difference between himself and the seller as to the price, he must pay the price charged and cannot defeat the claim of the seller by insisting that he bought the property on different terms or at a different price. *Caldwell & Drake v. Cunningham* ..... 272
3. Rights of Purchaser After Delivery When There Is a Difference as to Contract Price—Case Stated.—"C" negotiated with "C" and "D" for the sale of lumber, but no definite contract as to the price was agreed on, "C" understanding that he sold at one price and "C" and "D" understanding that they

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purchased at another price. While this condition existed, "C" shipped the lumber to "C" and "D" with an invoice stating the price as he understood it. "C" and "D" objected to the price but used the lumber. When "C" and "D" under these circumstances, accepted and used the lumber, their use was an acceptance of the price charged by "C." It was the making of a new contract between the parties. *Id.* ..... 272

## SCHOOLS AND SCHOOL DISTRICTS—See Elections—

1. Graded Schools—Election of Teachers.—The Board of Trustees of a graded school may at any time in the calendar year elect teachers for the ensuing school year that begins in the year in which the election of teachers is made. So that teachers may be elected in January to teach during the school year that begins the succeeding July. *Wheeler v. Burke.* ..... 148
2. Establishment of Graded School District—Election—Advertisement—Hand Bills—Sufficiency.—Copies of a newspaper advertisement containing a county court order calling for an election to be held at a certain time and place for the establishment of a graded school district, and properly posted in five conspicuous places for the required time, constitute a substantial compliance with the statute requiring the display of hand bills advertising the election. *Kelly, &c. v. Board of Trustees Evarts Graded School* ..... 612
3. Establishment of Graded School District—Election—Advertisement—Hand Bills—Not Posted by Sheriff.—Where notices of an election to establish a graded school district are posted as required by the statute, it is immaterial that the sheriff himself does not post them. *Id.* ..... 612
4. Graded School District—Election—Petition—Description of Boundary Appended After Petition Filed—Effect.—Where in a petition for an election to establish a graded school district, the description of the proposed boundary and site for the school house were appended after the petition was filed, this fact did not vitiate the petition, where the effect of the appended descriptions was not to add to or take from the boundaries set out in the petition, but merely to describe with greater accuracy the boundaries contained in the petition. *Id.* ..... 612
5. Graded School District—Petition—Approval by Trustee—Evidence.—Held under the evidence that a petition for the establishment of a graded school district was approved by the trustee of the subdistrict affected, in compliance with Section 4464 of the Kentucky Statutes. *Id.* ..... 612
6. Graded School District—Election—Question Propounded to Voters.—In an election for the establishment of a graded school district, held, under the evidence, that the question "Are you for or against the graded common school tax?" was properly propounded to each of the voters. *Id.* ..... 612

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7. Board of Education—Control and Disposition of School Funds.—The control and disposition of school funds by the Board of Education when they act within the scope of the statute is entirely in their discretion, and a suit by citizens seeking to have the board expend the money received from the Fiscal Court in certain ways or on certain buildings, will be dismissed. *Spradlin v. Floyd County Board of Education*..... 677
8. Board of Education—Rescission of Orders Made by Board.—If the Board of Education makes an order on its books in advance of its application to the Fiscal Court for school funds indicating to what purpose they will apply the funds, they may at any time afterwards revoke this order. *Id.* ..... 677
9. Taxes—Apportionment Between White and Colored Schools.—Where taxes are levied by a graded white common school district upon the property of a railroad or bridge company within such district, they, when collected, must be apportioned between it and any graded common school for colored pupils having the same boundary as the white district, as provided for in Section 4101, Kentucky Statutes. *Thornton v. White*..... 796
10. Trustees of Graded Common Schools—Expenditures.—The trustees of a graded common school district are restricted in the expenditure of the public moneys coming to them, to such purposes only as are authorized by the laws governing the management and control of the schools. *Id.*..... 796
11. Truant Officer—Payment of Salary.—A graded white school district having the same boundary as a graded colored school district, can not employ a truant officer and require the colored district to pay any part of his salary, although he may have performed service for both the white and colored school. *Id.*..... 796

SELF DEFENSE—See Criminal Law; Homicide.

SEPARATION OF JURY—See New Trial; Trial.

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SERVICES—See Contracts, 6.

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SPECIFIC PERFORMANCE—See Contracts.

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STATEMENT—See Liens.

STATUTE OF FRAUDS—See Contracts—

1. Contracts.—The Statute of Frauds (Section 470, Subsection 7, of the Kentucky Statutes), which prohibits the bringing of an action upon an agreement which is not to be performed within one year from the making thereof, refers to a contract which, by its terms, is not to be performed within a year, and which, from its very stipulations, is not capable of being performed within a year. *Nickell v. Johnson*..... 520
2. If a contract is capable of being performed within a year it is not within the Statute of Frauds. *Id.* ..... 521
3. Subsection 4, Section 470, Kentucky Statutes.—Subsection 4 of Section 470, of the Kentucky Statute of Frauds, which provides that no action shall be brought to charge any person upon a promise to answer for the debt, default or misdoing of another, unless the promise be in writing and signed by the party to be charged therewith, applies to actions and not to defenses. *Drake and Morton v. Rowe*..... 646
4. The Statute of Frauds does not make oral contracts to answer for the debt of another person invalid; it merely prohibits the bringing of an action upon such a promise. *Id.*..... 647

STATUTES—See Customs and Usages; Turnpikes and Toll Roads—

1. Amendment, Revision and Codification.—By Section 2 of Chapter 114 of the Acts of 1912, it was sought to amend Section 661, Kentucky Statutes, without re-enacting and republishing same, or the part thereof intended to remain in effect. Held: that the Section is void for failure to conform to the requirements of Section 51 of the Constitution. *Hall v. Clay, Commissioner of Insurance*..... 197
2. Construction—Effect of on Subsequent Cases.—When a statute of the State has been construed by the Court of Appeals, such construction is conclusive in all subsequent cases to which the provisions construed must be applied. *Commonwealth by etc. v. Intersouthern Life Insurance Co.*..... 228
3. Construction—Intention of Legislature.—Courts cannot add to or take from the words of a statute to give effect to any supposed intention of the Legislature; but when the intention can be ascertained with reasonable certainty, words may be altered or supplied in a statute so as to give it effect, and avoid any repugnancy to or inconsistency with such intention. *Commonwealth v. Stahr* ..... 388

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4. When Court May Correct Act.—When it is manifest upon the face of an Act of the Legislature that an error has been made in the use of words, the court may correct the error and read the statute as corrected in order to give effect to the obvious intention of the Legislature. Id..... 388
5. Public Roads.—Sections 39 and 40 relating to the construction of turnpikes owned by individuals or corporations, and prescribing the tolls to be charged for their use, and constituting a part of the Act of 1912, entitled "An Act defining public roads—Providing for their establishment, regulation and construction, and use and maintenance—Creating the office of Road Engineer, and prescribing the duties thereof" (Acts 1912, p. 309), are not germane to the subject-matter contained in the title, and are unconstitutional. *Burton v. Monticello & Burnside Turnpike Co.* ..... 787
6. Title—Constitutional Law.—When a subject foreign to the title is introduced into the body of an Act, if it is so separate and distinct from the remainder of the subject-matter of the legislation that it may be omitted without affecting the otherwise valid portions, the unconstitutional part will be omitted, and the remainder allowed to stand. Id..... 788
7. Turnpikes and Toll Roads—Tolls—Vehicles.—Under a statute prescribing tolls to be charged for the use of turnpike roads, and exempting certain specified vehicles from tolls, it is not to be presumed that the Legislature intended to exempt from tolls a new type of vehicle, having a new name, but performing the same service that was formerly rendered by a vehicle named in the statute. Id..... 788

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1. Injury to Pedestrian—Failure to Look for Approaching Car—Contributory Negligence—Question for Jury.—Plaintiff, after alighting from defendant's street car, passed around the rear end of the car, and in attempting to cross the parallel track, was injured by another car approaching thereon from the opposite direction. Held, that the question of plaintiff's contributory negligence, though she failed to look for the approaching car, was for the jury. *Louisville R. Co. v. Kennedy* 560

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2. **Parallel Tracks—Duty While Approaching Car Stopped to Discharge Passengers—Reasonable Control.**—It is the duty of the motorman on a street railroad car, in approaching a car stopped on a parallel track for the purpose of discharging passengers, to have the approaching car under such control that it may be stopped at a moment's notice. *Id.*..... 560

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1. **Action by Revenue Agent to Recover on Omitted Assessment.**—In this action by a revenue agent to recover taxes on property omitted from assessment, the ruling of the lower court in dismissing the proceeding was erroneous in view of the ruling of this court in *Commonwealth v. Ewald Iron Co.*, 153 Ky., 116. *Commonwealth v. Standard Oil Co. of Kentucky*..... 149
2. **Auditor Refunding Money Collected for Taxes—Construction of Section 162, Kentucky Statutes.**—The primary intention of Section 162 of the Kentucky Statutes, authorizing the Auditor of Public Accounts to refund money paid into the treasury for taxes when no such taxes were in fact due, was to authorize the Auditor to refund to officers who collected taxes due the State and paid more into the treasury than was in fact due from them; it was not intended to authorize the Auditor to correct assessments made of the property of the taxpayer and refund the amounts he may determine are due them. *Bosworth, Auditor v. Metropolitan Life Ins. Co.*..... 344
3. **Recovery of State of Taxes Paid.**—Taxes paid into the State Treasury can be recovered only in cases wherein it is expressly permitted by Statute. *Id.*..... 344
4. **Payment to Auditor of Taxes Not Due—Construction of Section 162, Kentucky Statutes.**—Section 162 of the Kentucky Statutes, which authorizes the Auditor of Public Accounts to

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- issue his warrant on the treasurer for money paid into the treasury for taxes which were not due, does not authorize the taxpayer who has paid a greater amount of taxes than he really owed, or through mistake, to appear before the Auditor of Public Accounts and require him to take up and pass upon the merits of the claim, and to draw his warrant on the treasurer if it should seem to him the tax had been improperly paid. *Id.* ..... 344
5. Action by Revenue Agent to Recover Taxes on Omitted Assessment.—In view of the ruling of this court in Commonwealth, *By etc. v. Ewald Iron Co.*, 153 Ky., 116, that of the circuit court in dismissing, at the cost of the revenue agent, this action brought by him to recover taxes on property claimed to have been omitted from assessment, was error. Commonwealth, *By etc. v. Gold and Stock Tele. Co., etc.*..... 361
6. What Not Omitted Property.—Property that has been undervalued by the owner is not property omitted from taxation within the meaning of the statute. *American Tobacco Co. v. Commonwealth* ..... 716
7. Tax Sale—Identification of Property.—To uphold a tax sale there must be a substantial compliance with the statute, and the proceedings must identify the property with reasonable certainty. *Hogue v. Gibson*..... 813
8. Tax Sale—Identification of Property—Sufficiency.—Where property is assessed, sold and reported in the wrong name, and is described as being located in the wrong precinct, a tax sale of such property is invalid. *Id.* ..... 813
9. Revenue Agents—Powers of.—Revenue Agents are officers created by, and their duties and powers prescribed by, the Statutes; they cannot exercise any authority unless it be conferred on them by the Statute. *Commonwealth v. Columbia Trust Co.* ..... 825
10. Omitted Property—Assessment.—An action in the name of the Commonwealth upon the relation of an Auditor's Agent, instituted under Section 4260 of the Kentucky Statutes, to retrospectively assess omitted property for taxation, does not abate upon the expiration of the term of the Auditor's Agent; it may be continued by his successor in office, or by the sheriff, or by any other officer authorized by Statute to institute such an action. *Id.* ..... 825
11. Revenue Agents—Expiration of Term—Appeal.—An Auditor's Revenue Agent, whose term expired in January, 1912, is without power to institute an appeal in 1914, from a judgment of the circuit court entered in October, 1912. *Id.*..... 825

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1. **Mutual Rights, Duties and Liabilities of Co-tenants—Adverse Possession.**—A tenant in common may hold land adversely to the other owners, but the statute of limitations will not begin to run until notice of such adverse holding is given to the tenants in common not in possession. *Burchett v. Clark* ..... 586
2. **Mutual Rights, Duties and Liabilities of Co-tenants—Actions Between Co-tenants.**—A tenant in common may recover judgment for his undivided interest in the common estate in ejectment against a co-tenant claiming the whole estate by virtue of adverse possession ripened into title. *Id.* ..... 586

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1. **Practice.**—Where the instructions to the jury have been stricken from the record, the only questions left for consideration are whether the pleadings support the judgment and the verdict is warranted by the proof. *C. N. O. & T. P. Ry. Co. v. Dungan* ..... 36
2. **Credibility of Witness—Question for Jury.**—In a common law action, tried by a jury, the credibility of a witness is for the jury, and neither the trial judge nor the Court of Appeals has a right to reject the evidence of a witness merely because his demeanor on the stand is such as to induce the belief that he is not telling the truth. *Campbell v. Mobile & Ohio R. Co.* ..... 58
3. **In Actions for Tort Where Only One of Several Defendants Is Summoned.**—Section 363 of the Civil Code provides that in certain actions the plaintiff can only demand a trial as to part of the defendants upon discontinuing his action as to those not served with process, but the defendant, if he wishes to object to a trial, must make his objection in seasonable time, and if he fails to so object, he cannot thereafter

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- avail himself either in the trial court or in this court of the benefits of the code provision. *Rosenberg v. Dahl* ..... 93
4. Pleading.—It is error either to hear evidence or submit a case on a cause of action or defense not relied on in the pleadings. *Palmer's Admx. v. Empire Coal Co.*..... 130
5. Taking Case or Question From Jury—Inferences From Evidence.—It is the peculiar province of the jury to draw inferences from proven facts. *C., N. O. & T. P. R. Co. v. Veatch*.... 136
6. When Verdict Should Be Directed by the Court—When Question of Negligence Should be Submitted to the Jury.—It is the province of a jury to pass upon and decide questions of evidence if the evidence is contradictory or conflicting; but it sometimes becomes the duty of the trial court, even where there is evidence both for and against the party seeking a recovery, to enter a non-suit or direct the finding of the jury. This duty the law imposes on the court when the evidence as a whole fails to show a right of recovery in the party seeking it; but to authorize an instruction as in case of a non-suit, it should appear that, admitting his testimony to be true and every inference that is fairly deducible from it, the plaintiff has still failed to support his claim. *Jonas v. South Cov. & Cin. St. R. Co.*..... 172
7. Separation of Jury.—Where the sheriff and one member of the panel were seen standing about thirty-five feet from the rest of the jury, engaged in conversation, held that such separation was not prejudicial in the absence of a showing that they were discussing the case, or that any member of the jury spoke to or was addressed by any outsider. *Deacon v. Commonwealth* ..... 189
8. Submission to Jury.—Where the essential facts of a case are uncontroverted and there is nothing but a question of law in the case, the same should not be submitted to a jury. *Rock Creek Property Co. v. Hill* ..... 324
9. New Trial—Newly Discovered Evidence.—A new trial will not be granted because of newly discovered evidence, where very little, if any, of the newly discovered evidence relied on is competent, and the facts alleged are not sufficient to show that the evidence could not have been discovered prior to the trial by the exercise of reasonable diligence. *Fuson v. Commonwealth* ..... 342
10. Pending Case—What Is.—The return of a verdict finding the defendant in an indictment guilty and fixing his punishment, does not terminate the case, nor does the entering of a judgment upon the verdict finally dispose of the case; the indictment is still pending until the expiration of the time given the defendant for filing a motion and grounds for a new trial, which, in a criminal case, may be done at any time before the ending of the term. *Brannon v. Commonwealth* ..... 350

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11. Conduct of Counsel—Argument.—Counsel should never attempt to get before the jury matters beyond the record having no real bearing upon the case, merely to prejudice the jury; and while one act of such impropriety may be overlooked, if the court properly admonishes the jury not to regard it, it should not be overlooked where he persistently attempts to inflame the jurors' minds. *Knights of Maccabees of the World v. Shields* ..... 392
12. Argument of Counsel—Comments Not Supported by Record.—Where a lawyer, in argument to the jury, makes statements not supported by the record, the trial judge should, without waiting for objections, promptly reprimand the offending counsel, charge the jury to disregard his statements, and if the comments are of such prejudicial nature as improperly to influence the jury, he should set aside any verdict rendered in favor of such counsel. *Id.* ..... 392
13. Argument of Counsel.—In a suit to recover on a policy against a fraternal insurance company, after admitting that it was a fraternal insurance company and predicating its case upon that idea, it was unfair for counsel to argue to the contrary. *Id.* ..... 392
14. Argument of Counsel.—Argument by appellee's counsel that appellant, a fraternal insurance company, "had millions, with its home in Michigan, and referring to appellee as a weeping widow, and in need of money, and that the company took money that would buy bread for her and the little ones and used it to pay officers' salaries, and that if the jury denied such cry and wail of the widow as had been heard for almost three years, they would turn her back upon her husband's grave, and her children out crying for bread," precluded appellant from having a fair trial, and after such argument, counsel did not make amends by telling the jury to "put the children out of sight, forget them." *Id.* ..... 392
15. Employers' Liability Act—In cases tried in the State courts under the Federal Employers' Liability Act, three-fourths or more of the jury may return a verdict. *L. & N. R. Co. v. Winkler* ..... 844

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TRUSTS—See Deeds—

1. Constructive Trustee.—Where property is impressed with a trust, and passes to a devise by will, or to an heir by the laws of descent, or to a purchaser for value with a knowledge of the trust, or to a purchaser without valuable consideration, it is still impressed with the trust, and the devisee, heir, or purchaser is a constructive trustee for the beneficiary. *Taylor v. Fox's Executors* ..... 804

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2. Parol Constructive Trust.—Where one procures a testator to devise land to him, upon his promise to hold it for the benefit of another, it creates a parol constructive trust, and may be enforced in equity upon parol testimony. Id. .... 804
3. Parol Trust.—A parol trust in lands will not be enforced, unless it shall be established by clear and undoubted testimony, where the establishment of the trust will be contradictory to written instruments, and where a rational doubt is left in the mind of the court, as to the acts of the one alleged to have created the trust. Id. .... 804
4. When Equity Will Refuse Relief to Claimant of Trust.—Courts of equity will refuse relief to those claiming the existence of trusts, where the claim is old and stale, and the acts of the parties authorize a presumption unfavorable to its continuance. Id. .... 805

## TURNPIKES AND TOLL ROADS—See Statutes—

1. Vehicles.—It is not the model or the name of a vehicle but the purpose for which it is used that fixes its toll charge for using a turnpike road having the right to charge tolls. *Burton v. Monticello & Burnside Turnpike Co.* .... 788
2. Roads—Statutes—Stage Coaches—Automobiles.—Under a statute which prescribed tolls to be charged for the use of turnpikes by "vehicles," "pleasure carriages or hackney coaches," "stage coaches," and "traction or other engines," but failed to fix a charge for automobiles using the turnpike, automobiles will be classed as "stage coaches," where they are used by a stage coach line in the place of stage coaches. Id. 788

## UNLIQUIDATED DAMAGES—See Pleading, 3.

## VACATION—See Judgment.

## VALIDITY—See Wills.

## VEHICLES—See Automobiles; Turnpikes and Toll Roads.

## VERBAL CONTRACTS—See Statute of Frauds.

## VERDICT—See Appeal; Criminal Law; Damages; Personal Injuries; Trial—

1. When Court May Disregard.—Where in an equitable action the court submits the issues to a jury merely for their advisory aid, their verdict is not necessarily conclusive, and the court may disregard it. *Sellers v. Sellers* ..... 9
2. A verdict of a jury will not be reversed unless it is clearly and palpably against the weight of the evidence. *C., N. O. & T. P. R. Co. v. Dungan* ..... 36

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3. The fact that the dangerous property leased by a tenant is worth only \$850 does not show that a verdict for \$2,000 is excessive. *Andonique v. Carmen* ..... 154
4. When Verdict for \$10,000 Not Excessive.—Where a passenger was injured in a railroad accident to such an extent that he was broken in health; permanently injured in his lungs; his nervous system broken down; his eyesight affected; his speech materially changed; the upper and middle lobes of his lung consolidated, which may lead to tuberculosis; his heart and bowels affected, a verdict of \$10,000.00 is not excessive, although no bones of the passenger were broken. *L. & N. R. Co. v. Mitchell* ..... 253
5. Right of Court to Make or Direct Correction of Defective.—It is usual and proper when a jury has returned a verdict that is merely defective in form for the court to send them back to their room so that they may correct it, or the judge may, if the verdict is a substantial response to the issues, correct informalities in it. *Gernert v. Straeffler's Exor.* ..... 606

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WATER COMPANIES—See Public Service Corporations.

WIDOWS—See Employers' Liability Act.

WILLS—See Descent and Distribution; Judgment, 18, 20—

1. Construction—Intention of Testator—Situation of Testator and Circumstances of Making of Will.—This court has many times written that in the exposition of wills the rule above all rules is that the intention of the testator shall prevail. In this case an old lady making her home in her declining years with a granddaughter, and possessing only her household goods and a house and lot, the income from which was insufficient for her reasonable maintenance, made a will devising to the grand-daughter \$300, and directing that at her death the real estate be sold and the proceeds divided equally among her seven children or their descendants. Held, that the three hundred dollar legacy was a charge upon the real estate. *Carter's Admr. v. Reynolds* ..... 39
2. Construction.—The words "bodily heirs" used in a will or deed are words of limitation, and ordinarily will be given their



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- technical meaning; the word "children" is a word of purchase. *Burns v. Moseley* ..... 199
3. Construction.—But when the words "bodily heirs" are used in a will interchangeably with the word "children," and it is apparent that the word "children" was used in the primary sense, and the words "bodily heirs" were descriptive merely, they will be construed as meaning children, and therefore words of purchase and not of limitation. *Id.*..... 200
4. Construction—Designation of Devisees—Children—Classes.—A general devise to the children of the testator includes a child en ventre sa mere at the time of the testator's death. *Lamar v. Crosby* ..... 320
5. Rights and Liabilities of Devisees and Legatees—Election—Time for Making Election.—Section 2067 Kentucky Statutes gives the surviving husband the right to renounce his wife's will; if he fails to renounce within one year, such failure amounts to an election to take under the will, as does likewise the institution of an action claiming the lands devised, as devisee under the will. *Knut's Guardian v. Knut*..... 398
6. Construction of—Life Estate.—Where a testatrix devised to her granddaughter, in trust, a portion of her estate, with the provision that "all the balance of said portion to be paid over to the Louisville Trust Company and held by said company in trust for the use and benefit of Ella Bull Snively during her life, with power to dispose of same by her last will and testament," this gave to the devisee a life estate, with the power of disposition, and not the fee in the estate covered by the devise. *Snively's Trustee, et al. v. Snively*.... 461
7. Construction of—Life Estate—Power of Disposition.—When the estate is devised for life, either expressly or by necessary inference gathered from the intention of the testator as expressed in the will, the power of disposition in the devisee will not convert the estate into a fee; but if the devise does not specifically or by necessary inference create a life estate, the power of disposition invests the devisee with the fee, and these rules apply with equal force whether the estate is given immediately to the devisee or placed in the custody of a trustee for his benefit. *Id.*..... 461
8. Contest—Preliminary Proof for Propounders—Burden of Proof.—When the propounders of a will have proven the due execution of a paper not irrational in its provisions nor inconsistent in its structure, language or details with the sanity of the testator, they may rest their case without introducing any evidence as to the soundness of mind of the testator; but if the will is so irrational or inconsistent as to be incompatible with soundness of mind, the introduction of some evidence of mental capacity is necessary in the preliminary proof for the propounders. *Bernert, et al. v. Straeffer's Exor., et al.*..... 605

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9. Contest—Burden of Proof—Introduction of Evidence.—When the propounders have shown the statutory execution of the paper and also the soundness of mind of the testator, when the appearance of the paper makes necessary evidence of this character, they may rest their case and the burden of proving that the testator was of unsound mind when he executed the paper, or that its execution was procured by undue influence, shifts to the contestants, and after they have concluded their evidence the propounders may introduce further evidence in contradiction or rebuttal of the evidence offered by the contestants. *Id.* ..... 605
10. Contest—Instruction as to Execution of Paper.—An instruction telling the jury that they should find the paper to be the will unless they believed that when it was “signed” by the testator, he was of unsound mind or under undue influence, was not prejudicial in this case; but it is better practice to use the word “executed” in place of the word “signed.” *Id.*..... 605
11. Contest—Evidence.—In a will contest it was not error to exclude evidence tending to show a parol agreement by which the testator promised to give to the contestants certain property, when it appeared that subsequent to this parol arrangement a deed was made conveying to him the property without any limitations or restrictions. *Id.* ..... 606
12. Vested Remainders.—A devise to one for life, and at his death to his children, then living, and those which may be born to him thereafter, creates a vested remainder at the death of the testator, in the children then living, and a vested remainder in each one of those born thereafter, as they come into being. *Williamson, et al. v. Maynard, et al.*..... 726
13. Life Estates—Contingent Remainders.—A devise to one for life, and at his death to his heirs, creates a contingent remainder in the heirs, because one cannot have heirs until he is dead, and it is uncertain who his heirs may be. *Id.* ..... 726
14. Vested Remainders.—A vested remainder passes upon the death of the remainderman to his heirs, or to his vendee or devisee. *Id.* ..... 726
15. Remaindermen—Uncertainty.—The uncertainty as to whether or not the remainderman will live until the termination of the particular estate, upon which the enjoyment of his estate depends, does not make his interest a contingent one. *Id.*..... 726
16. Construction—Intention.—The intention of the testator as to when an estate is to vest, is the rule by which to determine when it does vest, and this is to be determined by the terms used, and the rules established by the adjudications of the courts for construing devises. *Id.* ..... 726
17. Possession—Remainders.—The present capacity of taking possession, if the possession was to become vacant, distinguishes a vested from a contingent remainder. *Id.*..... 726

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18. Construction.—As a rule of construction, the words of the testator should be taken as expressing his meaning, unless it shall appear from the context, or from his will taken as a whole, that he does not use such words in their generally accepted meaning. *Id.* ..... 726
19. Contingent Remainders.—A contingent remainder is one limited, so as to depend on some event or condition which is dubious or uncertain, and which may never happen or be performed. *Id.* ..... 726
20. Vested Remainders.—A vested remainder may be created in property devised to an executor for the use and benefit of certain persons, if the devise has the other essentials necessary to create a vested remainder. *Id.* ..... 726
21. Requisites and Validity—Form and Contents of Instrument—When Signed "At the End."—Kentucky Statutes 468 requires a will to be signed at the end or close thereof. Held a substantial compliance, where a will was written on a sheet of legal-cap paper, and there not being room at the bottom of the sheet for the testator's signature, he wrote his name on the ruled line which runs from the top to the bottom of the paper near the left margin, the name being written thereon beginning at the bottom. There was a small space above his name as written, that is, between his name and the extreme left margin of the sheet, but this was not so unreasonable a blank space as to render the signature insufficient. *Graham v. Edwards* ..... 771

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